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In reply refer to:

Los Angeles 063030
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 18, 1956.

DECISION

:	
George W. Van Tassel :	Airport Lease
:	

Manager's Decision Vacated

An appeal to the Director, Bureau of Land Management, has been filed from the decision dated April 16, 1953, of the Manager, Land Office, Los Angeles, California, which canceled his airport lease Los Angeles 063030, because it was found, from a field inspection, that the lessee was using the lands for purposes other than those contemplated in the lease. In the decision of April 16, 1953, it was stated that the land was not being used as an airport but as home sites.

In the appeal the appellant has denied using the land for home site purposes. He asserted that he has not sold, leased or assigned any part of the property to any individual for a home site; that he has complied with all provisions of the lease; that he has made and maintained roads, has operated a cafe and public lounge and has maintained the airport in conformance to Civil Aeronautics requirements. The appellant states that he has drilled wells and bought an adjoining ranch for water; that he has accommodated "private flyers by the hundreds;" has staged an air show there, and has accommodated the United States Air Forces, Marine airplanes and Air Rescue.

A reexamination of the leased area was made by personnel of this Bureau on May 10, 11, and June 22, 1956, and a report based on the reexamination discloses that there has been constructed on the leased land airport runways and access roads to Giant Rock Airport; a number of buildings used in connection with the airport; a water tank; a frame cabin used as a residence by the lessee and his family; underground storage tanks, and various pieces of machinery and equipment used for road and runway upkeep. The report indicates that periodic inspections of the airport are made by the Civil Aeronautics Administration and each inspection has shown that the lessee, Mr. Van Tassell was running a legitimate airport and that all facilities were as is required by the C.A.A.

It appears from the examination of the land that the lessee is using the lands for purposes contemplated by the lease and that the lands are not being used for home sites. Further, it is stated in the above mentioned report that Mr. Van Tassel's personal beliefs do not have a detrimental effect upon his ability to carry out the terms of the lease, and that the cancellation of the lease was due to misunderstanding and misinterpretation of the facts.

Based on the reexamination of the land on May 10, 11, and June 22, 1956, it is concluded that the lessee, George W. Van Tassel, has not violated the terms of the lease. The Manager's decision of April 16, 1953, is therefore vacated and the lease remains in good standing subject to the payment of any annual rentals that may have accrued.

The field report filed with the record indicates a possible occupancy trespass by Mr. Raymond York who constructed a substantial cabin on the leased premises. A further report is being requested of the Bureau's State Supervisor, Sacramento, California, in order that a proper determination may be made regarding the cabin.

Earl J. Thomas

Acting Director

DISTRIBUTION:

Mr. George W. Van Tassel (Regular Mail)
Lands Staff Officer
Appeals List No. 1
PAS

affirmed A-27456
7-1-57

In reply refer to:

Fairbanks 012192
5.045

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 14, 1957.

Registered Mail
Return Receipt Requested

DECISION

George Gilbertson and	:	Special Land-Use Permit
Arthur Anderson (partnership)	:	

Decision of Manager Affirmed

The appellants have appealed from the decision of the Manager of the Land Office, Fairbanks, Alaska, dated March 23, 1956, rejecting their application for a special land-use permit for Lots 1 and 2, U. S. Survey No. 3301, containing five acres.

The rejection notice stated that in a court action the United States was declared to be the owner of the buildings which had been constructed on the land, that the buildings were being turned over to the General Services Administration for disposal as surplus property, and that the Bureau of Land Management had no authority to make commitments pertaining to such property.

Application for Special Land-Use Permit, Fairbanks 012192, for the land was filed on March 18, 1955. The applicants stated that improvements consisting of a service station and roadhouse, valued at $39,000.00, were on the land, and that they desired to use the land to continue operation of the service station and roadhouse and to add a motor court.

The records disclose that the improvements were placed on the land by the appellants, without authority, at a time when the land was withdrawn from all forms of appropriation under the public land laws; and that they had operated on the land a service station and a roadhouse known as Triangle Lodge, situated near Big Delta, Alaska at the junction of the Alaska and Richardson Highways. Action was brought by the United States against Mr. Gilbertson and Mr. Anderson in the District Court of Alaska, Fourth Division and by decision of June 30, 1953 in United States v. Anderson et al, 14 Alaska 349, 113 F. Supp. 1) the court held that neither Mr. Gilbertson nor Mr. Anderson had made a valid filing in the Bureau of Land Management for the land in question, and that they were mere trespassers at all times, the land being at all times withdrawn from appropriation. The findings of the court as set forth in the decision were that the land was withdrawn from all forms of appropriation by Public Land Order No. 386 1/, July 31, 1947, that in November, 1947 Mr. Gilbertson and Mr. Anderson, together with another partner, Louis Riley, went to the office of the Bureau of Land Management in Fairbanks, Alaska, to inquire if there was any public land available for a roadhouse business in Big Delta, Alaska; that an employee read to them PLO 386 and informed them that there was no public land available in the vicinity in which they were interested; that nevertheless Mr. Anderson on January 13, 1948 located the five acres in question and on January 21, 1948 he filed in the office of the United States Commissioner and ex-officio Recorder at Fairbanks a "Notice of Staking and Use of 5 Acre Headquarters and Business Site with Description thereof"; and that the recording of this notice was not required nor authorized by law or Departmental regulations. Thereafter, Mr. Gilbertson and Mr. Anderson (Mr. Riley in the meantime having severed his connection with the other two) continued their venture by building a large roadhouse, power plant, and other structures on the land and carrying on a business therein.

Following its decision of June 30, 1953, supra, the District Court entered a judgment on July 29, 1953 ordering, adjudging, and decreeing that the United States of America is the fee simple owner of the land in question along with any and all permanent improvements on the land. The District Court decision was affirmed by the United States Court of Appeals, Ninth Circuit, in a per curiam opinion on January 19, 1955 (Arthur Anderson and George Gilbertson, Appellant v. United States of America, Appellee, 15 Alaska 377; 218 F. 2d 780).

By letter of October 3, 1956 the Bureau's Operations Supervisor for Alaska advised that the property received under the court judgment was to be turned over to the General Services Administration for disposal.

In their appeal from the Manager's decision the Appellants state that they had entered the land on incorrect advice of an attorney, and they contend that the Manager's decision is unfair and unjust; that it is within the authority of the Director of the Bureau of Land Management, and it would not be against public interest, order or dignity to permit them to use the land that they had improved and thus mitigate their loss.

1/ PLO was amended or in part revoked by Public Land Orders 448, 601, 757, 765, and 808; however, the land involved in this appeal has continued to be withdrawn from all forms of appropriation and is presently withdrawn by PLO 808, February 27, 1952.

The lands sought contain permanent improvements which have been determined to belong to the United States. Such improvements have been determined to be excess to the needs of the Bureau of Land Management and are to be disposed of by the General Services Administration in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 (40 U.S.C., sec. 471, et seq.) and the regulations of the General Services Administration, Title 2, Real Property Management (December 1953). In view of this situation, the rejection of the application for a special use permit covering the land was proper.

For the reasons indicated the Manager's decision is affirmed.

The right of appeal to the Secretary of the Interior is allowed. If such appeal is taken, it must be received in this office within 30 days from notice hereof and must be accompanied by a $5.00 filing fee. Strict compliance must be made with 43 CFR Sections 221.31 to 221.35, inclusive, and other pertinent sections of the Rules of Practice, Circular 1950, effective May 1, 1956 as amended by Circular 1962, effective October 4, 1956. See Information Sheet attached.

Edward Woozley
Director

Attachment

DISTRIBUTION:
Mr. George Gilbertson and
  Mr. Arthur Anderson (Partnership) (Registered Mail)
Lands Staff Officer (1)
Appeals List No. 1
CIS

DEPT. OF INTERIOR
SACRAMENTO, CAL.

JAN 31 1 36 PM 1957

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:

Fairbanks 010245
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 15, 1957

Certified Mail
Return Receipt Requested

DECISION

	:	
Joseph Evans	:	Special Land-use Permit
	:	

Acting Manager's Decision Affirmed

Joseph Evans has appealed to the Director, Bureau of Land Management, from a decision of the Acting Manager of the Land Office, Fairbanks, Alaska, dated October 19, 1954 which rejected his application for special land-use permit Fairbanks 010245., embracing an unsurveyed tract between lot 9, U. S. Survey 2771, Big Delta, and the Richardson Highway right-of-way. The Manager's action was predicated upon a report of field examination of the land sought wherein it was concluded that use of the land as a parking area would interfere with an access road from tracts of surveyed land to Richardson Highway at this point, as well as the right-of-way for the telephone line and Canol Pipeline.

Appellant alleges in pertinent part that:

1) He has expended an estimated $12,000 and intends to invest an additional $8,000 improving lot No. 9 Survey 2771 Big Delta.

2) He is operating a business on surveyed lot No. 9 as required by law and that his investment is useless without the land fronting on the lot for parking space.

3) Use of the land sought would in no way interfere with the pipeline, overhead wiring, or access roads.

4) A special land-use permit was issued to the Firestone Garage authorizing the use of the land fronting on an adjoining lot and that semi permanent improvements have been constructed thereon.

The record shows that the land sought was reserved for townsite purposes by Public Land Order 808 dated February 27, 1952. It consists of a 200 foot wide strip of land lying between surveyed lot 9, U.S. Survey 2771 and the Richardson Highway. Lot 9 [the lot occupied by appellant] is one of a group of surveyed lots located adjacent to Richardson Highway at this point. By his application appellant states that he wants to use the land for a parking area in conjunction with a business establishment located on lot 9. The approved report of field examination states that the strip of land involved includes the area occupied by the Army Telephone line and the Canol Pipe line as well as a part of the right-of-way of the Richardson Highway. It also indicates that use of the land for parking purposes would block access to the Richardson Highway to occupants of the adjoining lots as well as interfere with the telephone and pipe line rights-of-ways. Moreover, the Survey plat shows that the adjoining lot 9 on which appellant has established his business concern consists of a total of .625 acres which is a sizeable business site.

The appellant has not offered any evidence to controvert the findings embodied in the field report - his assertions that such findings are not correct are not sufficient to rebut them. Cf. Mary Refugio Jackson, A-27236, February 29, 1956.

In his appeal Mr. Evans states "there is little doubt that the land could be used for parking with nothing being said but I can't afford to fill and gravel this space without assurance otherwise." It thus appears that the appellant believes that a special land use permit gives tenure. However, 43 CFR, 1954 ed., sec. 258.7 provides in part that a permit will not be issued for a period exceeding 5 years and "It also will be revocable in the discretion of the authorized officer, at any time, upon notice, if in his judgment the lands should be devoted to another use". Thus, it is clear that the expenditure of a considerable amount of money in improvements based upon a special land use permit involves a measure of risk.

With respect to the appellant's statement that a permit has been issued to the Firestone Garage and store authorizing the use of land fronting on an adjoining lot, no showing has been made by the appellant that the factors on which the rejection of his application is predicated are present in the Firestone permit.

In view of the foregoing circumstances in the record it appears that the Acting Manager was correct in denying the application for special land-use permit and his decision of October 19, 1954 is hereby affirmed.

Joseph Evans is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp, Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

For the Director:

G. H. Fish

DISTRIBUTION:

Mr. Joseph Evans (Certified Mail)
Lands Staff Officer
Appeals List No. 1
CFG

[illegible]

[illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

[illegible]

DECISION

[illegible] : Special land use permit

MANAGER'S DECISION AFFIRMED

[illegible] has appealed from a decision of the Manager [illegible] his application for a special land use permit to maintain a cabin in the [illegible] Forest Reserve, [illegible] public land [illegible] for public recreation. The application was rejected because the presence of the cabin was deemed to [illegible] the value of the tract [illegible] with recreational purposes. The decision allowed the appellant 90 days in which to remove the cabin.

The record shows that a change of ownership had been made, [illegible] and was given until [illegible] in which to remove the cabin. The improvements were not removed and [illegible] the appellant purchased the cabin. The appellant was advised that it was in trespass. On [illegible] he was granted a one year special land use permit, and advised to remove the cabin within that period.

The Manager found that the existence of the cabin on the reserve renders the [illegible] of public recreation.

The record also indicates that the cabin is a [illegible] to the use of the land for the purpose for which the land was withdrawn, [illegible] public recreation. Since the issuance of special land use permits is discretionary, we believe that it was a proper exercise of that discretionary authority for the Manager to reject the application on account of the cabin.

Accordingly, the decision of the Manager is affirmed, and the appellant is allowed [illegible] after this decision becomes final in which to remove the cabin. [illegible] remove the structure within the time allowed, the structure shall become the property of the United States.

appeal to Sec
affirmed A-27777 - 12-12-58

In reply refer to:
Fairbanks 013254
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 11, 1958

Certified Mail
Return Receipt Requested

DECISION

Michael Andrew Molchan	:	Special Land-Use Permit

Manager's Decision Affirmed

Michael Andrew Molchan has appealed from a decision of the Manager rejecting his application for a special land-use permit to maintain a cabin in the Berry Creek Reserve, withdrawn under Public Land Order 386, dated July 31, 1947, for public recreation. The application was rejected because the presence of the cabin was deemed to decrease the value of the reserve and will interfere with contemplated projects. The decision allowed the appellant 90 days in which to remove the cabin.

The records reveal that a charge of trespass had been made against one Carl M. Pederson, who was given until July 15, 1948 in which to remove the cabin. The improvements were not removed and in 1949 the appellant purchased the cabin. The appellant was advised that he was in trespass. On April 28, 1955 he was granted a one year special land-use permit, and advised to remove the cabin within that period.

The Manager found that the existence of the cabin on the reserve reduces the potential of the land as a place of public recreation.

The record also indicates that the cabin is a "tarpaper shack." Its existence on the land is inconsistent with the purpose for which the land was withdrawn, i.e. public recreation. Since the issuance of special land use permits is discretionary, we believe that it was a proper exercise of that discretionary authority for the Manager to reject the application for renewal of the permit.

Accordingly, the decision of the Manager is affirmed, and the appellant is allowed 90 days after this decision becomes final in which to remove the cabin. Under 43 CFR 258.14 if the permittee fails to remove the structure within the time allowed, the structure will become the property of the United States.

Mr. Molchan is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:

Mr. Michael Andrew Molchan (Certified Mail)
Lands Staff Officer
Appeals List No. 1
JHO'D

Info + Status advised
7/8/58 JEB

LD(Sec) JEB

In reply refer to:

Fairbanks 017758
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 24, 1958

Certified Mail
Return Receipt Requested

DECISION

Waring Bradley Alaska Propane Company, Inc.	:	Request for Permission to Inspect Record

Request Granted
In Part

Waring Bradley has "appealed" to the Director, Bureau of Land Management, from the action of the Manager, Land Office, Fairbanks, Alaska, denying his two requests to examine case file Fairbanks 017758, an application for a pipeline right-of-way filed by Alaska Propane Company, Inc.

It should be pointed out that the departmental regulations do not provide for a right of appeal from a denial by the Manager of such a request, though they do provide that if the request for permission to inspect records is denied the applicant may submit his request to the head of the Bureau (43 CFR 2.2). Since no appeal is provided for in the regulations, the $5.00 filing fee paid by Mr. Bradley is unnecessary and may be refunded by the Manager of the Fairbanks Land Office upon request therefor by Mr. Bradley. Since no formal appeal procedure is provided, Mr. Bradley's "appeal" will be considered only as a submission to the Director, of his request to examine the files as provided for in 43 CFR 2.2.

In Mr. Bradley's requests to see case file Fairbanks 017758, he has expressed his interest in the case file, as follows: "As an oil operator I am concerned in any applications or action taken regarding pipelines" and "This is public business and should be available for examination at all times." In his "appeal" Mr. Bradley reiterates and amplifies these arguments, and asserts that originally he sought to look only at the map of the proposed pipeline filed with the application. This he asserts is an integral part of the description contained in the serial register and that the latter, a public record, is not complete unless supported by the map. He also asserts that he should be entitled to inspect any other case file in the Land Office files at any time without presenting a reason for said request.

LD

The applicable departmental regulations (43 CFR 2.1 and 2.2(a)) issued under section 3(c) of the Administrative Procedure Act (5 U.S.C., 1952 ed., sec. 1002(c)) provide:

> "§ 2.1 Inspection.
> Unless the disclosure of matters of official record would be prejudicial to the interests of the government, they shall be made available for inspection or copying, and copies may be furnished, during regular business hours at the request of persons properly and directly concerned with such matters. Requests for permission to inspect official records or for copies will be handled with due regard for the dispatch of other business.
>
> "§ 2.2 Determinations as to availability of records.
> (a) In the first instance, the person whose general duties include the responsibility for the custody of a record shall determine whether the disclosure of the record would be prejudicial to the interests of the Government and whether the person making the request is properly and directly concerned with the subject matter. If a request for permission to inspect records or for copies is denied, the applicant may submit his request to the head of the bureau or office."

Under these regulations, we grant Mr. Bradley's request to inspect the entire non-confidential portion of case file Fairbanks 017758, including the pipeline map, in which he has expressed a particular interest, as such inspection is not prejudicial to the interests of the Government. Mr. Bradley's request to inspect any and all records on the ground that "This is public business and should be available for examination at all times" is denied for the reason that the grant of such unlimited examination of public records would seriously hamper the dispatch of public business and therefore would clearly be prejudicial to the interests of the Government. Each request to inspect public records must be properly filed and individually considered on its own merits.

The Manager is instructed to make case file Fairbanks 017758 available to Mr. Bradley, in accordance with this decision.

Mr. Bradley is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Charles P. Mead
Acting Director

Enclosure

(Distribution - page 3)

DISTRIBUTION:

Mr. Waring Bradley (Certified Mail)
Minerals Staff Officer (5)
Lands Staff Officer (5)
Management Improvement Officer
Alaska Propane Company, Inc. (Regular Mail)
Appeals List No. 1
LO(Fairbanks)—with case record Fairbanks 017758
VJR

37405

In reply refer to:
Los Angeles, S.F., 119383
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 4, 1958

Certified Mail
Return Receipt Requested

DECISION

J. Allan Mahana : Public Lands (Restoration)

State Supervisor's Decision Affirmed

J. Allan Mahana has appealed from the decision of the Bureau's State Supervisor at Sacramento, California, denying his petition for the restoration to agricultural entry of certain public land now under a reclamation withdrawal.

The land was included in a first form reclamation withdrawal pursuant to the Act of June 17, 1902 (43 U.S.C., 1952 ed., sec. 371 et seq.) and may not be restored to agricultural entry without the consent of the Bureau of Reclamation. The latest report of the Bureau of Reclamation, dated July 23, 1958, again declines to approve the restoration of the land to entry, for the reason that the land may be needed in the development of the Imperial West Mesa irrigation project.

Since the Bureau of Reclamation has reported that it desires to retain the land, the petition for revocation of the withdrawal will be rejected. Byard C. Wilburn, Arizona 67202 (July 9, 1956).

Accordingly, the decision of the State Supervisor is affirmed.

Mr. Mahana is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:
Mr. J. Allan Mahana (Certified Mail)
Lands Staff Officer
Appeals List No. 1
JHO'D

45092

[illegible] (ADVERSE) - 1 Generally

The Alaska Homesite Act contemplates that an application to purchase shall be filed within five years after the filing for recordation of the notice of location. However, a late-filed application to purchase can be approved in appropriate instances under the principles of equitable adjudication.

[illegible], Fairbanks [illegible] (February 9, 19[illegible])

LO(Sec)

HOMESITE (Alaska) * 1 Generally

The Alaska Homesite law contemplates that an application to purchase shall be filed within five years after the filing for recordation of the notice of location. However, a late filed application to purchase can be approved in appropriate instances under the principles of equitable adjudication.

Paul Miller Bittner, Fairbanks 010048 (February 9, 1959)

LO

time within which to file his application to purchase and necessary proofs, together with a full and detailed explanation of any new facts showing the cause of delay in submittal of the application to purchase. If the appellant fails to file the necessary papers within the time allowed by the Manager, the decision of the Manager will stand. If the appellant does submit the necessary documents, the entire case file will be submitted to this office for equitable adjudication in accordance with established procedures, absent intervening rights.

Mr. Bittner is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal, there must be strict compliance with the regulations.

For the Director:

A. H. Dixon

Enclosure

DISTRIBUTION:

Mr. Paul Miller Bittner (Certified Mail)
Lands Staff Officer
Appeals List No. 1
JHO'D

49261

5.06a

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 13, 1959

Memorandum

To: Area Administrator, Area 2

From: Director, Bureau of Land Management

Subject: Antiquities Act - Petrified Wood

Attached is a copy of the Solicitor's memorandum of January 19 in which he states that deposits of petrified wood are not within the contemplated protection of Sections 1 and 3 of the Antiquities Act of June 8, 1906 (16 U.S.C. 431, 432 and 433). Under the authority of Section 2 of the Act the Petrified Forest National Monument has been created protecting deposits of petrified wood. Outside the Monument petrified wood is a locatable mineral and deposits are not subject to the protective provisions of the Act.

It is unlikely, at this time, that any additional areas will be withdrawn as national monuments for the purpose of protecting deposits of petrified wood. However, the States of Utah, Nevada and others have indicated their interest in preserving such deposits. We suggest that when interest is made known that the proper State authorities be advised of the laws providing for exchange or purchase under which the State may obtain title to the lands. In addition deposits of petrified wood may also be protected by placing the land under Executive Order withdrawal. This Bureau would entertain such requests where the State authorities or other responsible agencies would assume the responsibility for protecting the deposits from removal and would effectively police the area.

Director

Route		Initial	Date
1	ASSO cc	abc	2-24
	Adm Asst		
	O!C SrG cc		
2	Manager	hom	2/26
3	Asst Mgr		
4	Lands	DHW	2/26
	Sm Tracts		
5	Minerals	OS	3-2
7	Expe Ofcr		
6	Information		
	Supply		
8	to file		

Necs. Action
Information ☐ Distrib. ☐

Attachment

Copy to: Area Administrators 1, 3, 4
State Supervisors

Scotty V.

5

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

January 19, 1959

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Petrified Wood

In your memorandum of October 27, 1958, you ask whether petrified wood is a mineral subject to location under the United States mining law or is subject to the Antiquities Act?

If petrified wood is subject to the provisions of sections 1 and 3 of the Antiquities Act of June 8, 1906 (34 Stat. 225; 16 U. S. C. secs. 432, 433), it would not, in any event, be subject to mining location. Section 2 of that act provides for the creation of national monuments covering "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest * * *." It does not refer to antiquities, as such and, by itself, would affect this question only if the petrified wood were within a national monument created under the act.

Sections 1 and 3 deal primarily with objects of archaeological interest which would include (in its broadest sense) fossil or other remains of ancient peoples, artifacts pertaining to them, fossils of prehistoric animals and, possible other life. The inclusion in the section of antiquities no doubt broadens the meaning somewhat. So far as I am aware, no attempt has been made to give an all inclusive definition of what these sections cover. However, I know of no especial scientific interest in petrified wood in the mass. Of course such interest would attach to the natural phenomenon, but there is no reason to believe that it would not be capable of satisfaction in the United States within areas withdrawn from exploitation under the mining laws which include but are not (I believe) limited to the very substantial area embraced in a national monument (in Arizona). Actually the only use of the word "scientific" in the pertinent sections of the act is in defining the institutions which may be permitted to gather the objects defining therein. The ultimate purpose of section 3 is to preserve the objects in permanent museums. While it is true that specimens of petrified wood are found in many museums, comparatively small quantities

Scotty V.

are involved and they are considered as natural curiosities rather than as antiquities. The National Park Service, which is perhaps the primary agency interested in enforcing the act, has long been aware of and has publicized the fact that private dealers in petrified wood and petrified wood products in the vicinity of the monument obtain their material "from sources outside the monument." While the "sources" are not identified, it seems probable that they include public lands since there are large areas of public land in that vicinity.

Section 3 of the act in particular refers to "the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity." Only the last clause could apply to petrified wood under the established definitions of the terms used but even such an application of it would somewhat strain the definition of antiquity as it is customarily understood and applied. An antiquity is a relic or monument of ancient times, not a natural phenomenon as such. It relates usually to objects of great age manufactured by ancient peoples. As used in the act it is properly to be construed in connection with the words which precede it. The legislative history of the act shows that the purpose was limited to "the historic and prehistoric ruins and monuments on the public lands of the United States." S. Rep. 3797, 59th Cong. The House report on a companion bill, H. R. Rep. 2224 discusses "ruins" and "the remains of the historic past" and states "These relics are priceless when secured by proper scientific methods and of comparatively little value when scattered about in museums and colleges without accompanying records." The House report includes a long memorandum prepared by an archaeologist entitled "Memorandum covering the historic and prehistoric ruins of Arizona, New Mexico, Colorado and Utah and their preservation."

On the other hand many deposits of petrified wood are, in whole or in part, valuable minerals. The National Park Service in its publication Petrified Forest National Monument, Arizona, refers to the use of it in the manufacture of semi precious stones. It is stated that the gem material includes chalcedony, carnelian, chrysoprase, jasper, onyx, and moss agate. The Minerals Yearbook of the Bureau of Mines for at least certain years reports the use of "agatized wood" in the manufacture of gem stones.

I do not believe that Congress intended in the Antiquities Act to limit the operation of the United States mining laws. Neither the language of the act nor its history so implies. Repeals by implication are not favored. Further, in the more than fifty years since the Antiquities Act was passed there has been a substantial commerce in petrified wood and no one until now appears to have raised the question of possible application of the act.

Scotty V.

It is my conclusion that the Antiquities Act does not apply to petrified wood which occurs in such quantity and quality as to constitute a valuable mineral. The same reasoning would appear to apply to such material which is not by definition a valuable mineral but since the sale of materials is discretionary, it may be disposed of or not, as policy dictates. It is again emphasized that this opinion is not intended to construe section 2 of the act which, although of comparable purpose, may well be more comprehensive since it contemplates the preservation of a broader class of objects in situ than does section 3.

Although petrified wood is not considered to fall within the provisions of sections 1 and 3 of the Antiquities Act, it seems to be recognized that certain deposits or concentrations within the exterior limits of some deposits may prove to be of great scientific interest and to warrant preservation as such. As already indicated, section 2 of the act may be construed to apply to these. Where, as I am informed is sometimes the case, a State is interested in the preservation of a particular deposit or particular deposits with a view to perpetuating their existence in situ, it would be possible for it to obtain title to the lands by exchange or purchase under applicable laws.

/s/ Edmund T. Fritz

Deputy Solicitor

Scotty V.

PUBLIC LANDS * 8 Special Land Use Permit

Where land has been used for military purposes, and has been contaminated by explosives, so that only the surface may be safely used, an application for a special land use permit to drill for water and a desert land application for such land are properly rejected.

Earl Williams, Los Angeles 0155432, 0146639 (February 16, 1959)

Scotty V.

5

In reply refer to:
Los Angeles 0155432
0146639
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 16, 1959

Certified Mail
Return Receipt Requested

DECISION

Earl Williams	:	Special Land Use Permit

Manager's Decision Affirmed

Mr. Earl Williams has appealed from a decision of the Manager rejecting his application for a special land use permit. Mr. Williams applied for the permit in order to drill an exploratory well, to demonstrate the availability of water for a proposed desert land entry. The application was rejected for the reason that the land, formerly within the California-Arizona Maneuver Area, is contaminated by explosives, and restricted to surface use only.

Mr. Williams contends that since the Government contaminated the area, it should decontaminate it.

After Mr. Williams' appeal was received, the Land Office Manager wrote to the United States Army Corps of Engineers, inquiring as to the status of the land. The Chief of the Real Estate Division replied that the land is still contaminated, that there is no feasible method of decontaminating it except at a prohibitive cost, and that Army regulations do not authorize decontamination where its cost exceeds the value of the land.

Any portion of this land, therefore, may contain explosives liable to detonate if encountered by a well drilling bit. In view of this dangerous situation, a special land use permit to drill for water may not be issued. The Manager's decision, rejecting Mr. Williams' application, was correct, and is affirmed.

Moreover, it would appear that Mr. Williams' application for desert land entry also must be rejected, because of his failure to comply with the requirements of filing a proper application. These requirements have been enumerated in the recent decision, Dottie J. Beck et al., Nevada 037539, etc. (August 19, 1958):

> "First, an applicant for desert land entry for lands to be irrigated from wells must furnish plausible, presumptive evidence that an adequate underground water supply is available for the irrigation of the land. Cf. Ezra M. Carter, Harry Fogliatti,

Scotty V.

A-26165 (October 5, 1951). An adequate water supply is construed to mean the amount required to meet the seasonal requirements for the production of irrigated crops typical to the area on all of the irrigable portions of the lands involved. Cf. Robert Charles Powell, A-25828 (April 7, 1950). A proper showing as to water supply must include any information available from the State Engineer's office or other technical information or advice concerning the occurrence of ground water in the vicinity; the location, depth, static water level, draw-down water level, and the volume of flow of other wells heretofore sunk and affording a water supply to adjoining or nearby lands; or a statement that there is no such information available.

Second, an applicant must submit with his application a plan of irrigation, as required by the regulation in 43 CFR 1954 ed., 232.14. The plan must be completed in sufficient detail to reasonably demonstrate that irrigation development of the land is feasible by some practical means. Cf. Roy N. Brown, A-25935 (November 16, 1950). The plan must show the proposed location of the well or wells, the size of the well, the anticipated depth to water and volume of output, along with the source of power for the pump, size and distribution of canals and ditches, flumes, diversion boxes, and other installations necessary to distribute the water to all of the irrigable parts of each legal subdivision to be irrigated. This showing is to be accompanied by an estimate of the investment costs of the equipment, installations or other improvements necessary to reclaim the land. Since the test of the adequacy of the irrigation system depends upon the water requirements of crops to be grown, the plan must indicate the types of crops that will ordinarily be produced, accompanied by an estimate of the normal seasonal water requirements for the production of such crops.

Third, the applicant must file with his application a showing as to the character of the land itself. This may be accomplished by reference to published soil and topographical maps or sketches describing the soil texture, depth and character of the sub-soil, if known. It must also indicate the approximate irrigable area of each legal subdivision and the topographical features of the area to be irrigated."

Mr. Williams applied for the special land-use permit in order to make the showing as to water, but since that permit may not issue, that showing cannot be made. Mr. Williams' plan of irrigation consisted of a sketch outlining the exterior boundaries of the land applied for, and the location of proposed wells and a ditch system covering the land; this has been held not to meet the requirements of the regulation. Dottie J. Beck, supra. Mr. Williams made no showing as to the character of the land.

Because the appellant has not made the showings required, his application for desert land entry must be, and is hereby rejected. Moreover, since it appears that the only possible source of water is ground water, and drilling for such water would be hazardous, it is consonant with the public interest to reject the desert land application.

Mr. Williams is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:

Mr. Earl Williams (Certified Mail)
Lands Staff Officer
Appeals List No. 1
MG

49261

LD(Sec)

PUBLIC LANDS * 8 Special Land Use Permit

An application for special land use permit to construct boat docking facilities and other improvements along the shore line of a reservoir will be rejected where the record shows that the beach at this point is used by the public in general and is needed to permit access to the beach for fishing and other public purposes and the land is classified for disposal under the Recreational Site Act.

Gilbert C. Wedertz, Sacramento 055330 (March 24, 1959)

20

In reply refer to:
Sacramento 055330
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 24, 1959

Certified Mail
Return Receipt Requested

DECISION

Gilbert C. Wedertz : Special Land Use Permit

Decision of the Manager Affirmed

Gilbert C. Wedertz has appealed from a decision of the Manager which rejected his application for special land use permit because the land is valuable for public recreation purposes and has been classified for disposal under the Recreation and Public Purposes Act.*

The appellant alleges in pertinent part that (1) there is little further room for boat docks and other shore installations such as he proposed unless the Bureau of Land Management releases some of the public land, (2) existing facilities are inadequate, (3) that he will construct all permanent improvements on privately owned lands thus removing the objection that expensive improvements would have to be removed if the special land use permit was canceled, and (4) that the land is now undeveloped and that the public interest would be better served if the land was developed as he proposes.

The land involved fronts on Bridgeport Reservoir in Mono County, California and comprises a small tract of public land lying between the reservoir and State Highway Route 96. The record reveals that the reservoir is stocked with fish by the California Fish and Game Department and that the land is used extensively by members of the public to permit access to the beach at this point and to the reservoir for the launching of small boats and for fishing. It indicates further that there are two boat docks on the reservoir which are adequate to meet the need at the present time and that there are privately owned lands located along the east shore of the reservoir which might be developed for further dock and boating facilities.

The decision as to whether public lands should be classified for disposal pursuant to a particular public land law or not at all is within the discretion of the Secretary of the Interior. Ernest C. DeFord et al., A-26591 (February 6, 1953). The Department has held that private applications for lands chiefly valuable for public recreational purposes are properly rejected. Cf. George T. Aldridge et al., A-26805 (February 8, 1954). Moreover, it is the express policy of the Department to make public lands valuable for public recreation purposes available for use by the general public. See Policy Statement, approved April 16, 1958, by the Secretary of the Interior.

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* The Act of June 14, 1926, as amended (43 U.S.C., 1952 ed., Supp. IV., sec. 869).

Scotty V.

After careful consideration of the record in this case including the allegations of the appellant we find no error in the Manager's decision which rejected Mr. Wedertz's special land use permit application on the grounds that the lands are classified as primarily valuable for public recreational purposes and for disposal under the Recreational Site Act. In the absence of error on the face of the record an appellant must show by positive and substantial evidence that the adverse classification is in error. Cf. Mary Refugio Jackson et al., A-27236 (February 29, 1956). Therefore the decision of the Manager is affirmed.

Gilbert C. Wedertz is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Earl J Thomas

Acting Director

Enclosure

DISTRIBUTION:

Mr. Gilbert C. Wedertz (Certified Mail)
Hon. Alan Bible, United States Senate
Hon. J. Arthur Younger, House of Representatives
Walker River Irrigation District (Regular Mail)
County of Mono (Regular Mail)
Lands Staff Officer (1)
Appeals List No. 1
CFG

50991

PUBLIC LANDS * 7 Withdrawals

Where a petition for restoration of land from reclamation withdrawal was rejected in accordance with a recommendation by the Bureau of Reclamation and on appeal the Bureau of Reclamation has recommended the withdrawal be revoked, the record will be remanded for appropriate action.

Ivan Webster, Sacramento 054502 (November 9, 1959)

In reply refer to:

Sacramento 054502
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 9, 1959

DECISION

Ivan Webster	:	Petition for Restoration

Case Remanded

Ivan Webster appealed from a decision of the Manager, which denied his petition for the restoration of certain land from reclamation withdrawal. The petition was denied in accordance with a recommendation by the Bureau of Reclamation that the land be retained under withdrawal.

The record discloses that subsequent to the Manager's decision the Bureau of Reclamation has determined that certain lands withdrawn under the First Form Reclamation Withdrawal of June 3, 1942,* including the land described in the subject petition for restoration, are no longer required for reclamation purposes. Information contained in the record indicates the Regional Director, Bureau of Reclamation, has recommended that the cited withdrawal be revoked in so far as it applies to the land in the petition. In view thereof, the case record is being remanded to the Manager, through the Bureau's State Supervisor at Sacramento, California, for appropriate action.

When the land is restored to appropriation under the public land laws application for the land may then be made in accordance with the terms of the restoration order. No preference right will inure to the appellant by reason of his petition for restoration.

For the Director

---

*Pursuant to the Act of June 17, 1902. 43 U.S.C., 1952 ed., sec. 371

DISTRIBUTION:

Mr. Ivan Webster (Regular Mail)
Commissioner, Bureau of Reclamation
Regional Director, Region 2, Bureau of Reclamation
Lands Staff Officer
Appeals List No. 1
MAG

63957-59

6-15 LD(Sac)

DOCKET FILES

PUBLIC LANDS * 7 Withdrawals

MINING CLAIMS * 1 Generally

An application for restoration to mineral entry of land withdrawn for reclamation purposes is properly denied where the Bureau of Reclamation believes it to be in the best interest of the United States to retain the lands in their present status until the project is completed and public use requirements in the area determined.

Herbert S. Blakemore, Sacramento 056436 (March 18, 1960)

In reply refer to:

Sacramento 056436
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 18, 1960

Certified Mail
Return Receipt Requested

DECISION

Herbert S. Blakemore	:	Application for Restoration to Mining
	:	
	:	

Manager's Decision Affirmed

Herbert S. Blakemore has appealed to the Director, Bureau of Land Management from the decision of the Manager, Land Office, Sacramento, California, dated April 9, 1959, holding for rejection his application for restoration to mining location and entry all of sec. 30, T. 34 N., R. 8 W., M.D.M. California, filed under the act of April 23, 1932 (47 Stat. 136, 43 U.S.C. 154).

The basis for the rejection was that the lands involved are included in a first form reclamation withdrawal for the Trinity River Division of the Central Valley Project, effective March 12, 1956, under sec. 3 of the act of June 17, 1902 (30 Stat. 388), and that the Bureau of Reclamation is opposed to the restoration of the lands to location and entry under the general mining laws until the Trinity River Division project is completed and the public use requirements in the area are determined.

On appeal the applicant has reduced the area requested for restoration to the S½ of sec. 30.

Subsequent to the appeal, a further request for a report and recommendation was addressed to the Bureau of Reclamation. The Assistant Commissioner of Reclamation, in a report dated June 15, 1959, stated in part:

> "* * */W/e believe it to be in the best interests of the United States to retain the lands in their present status until construction of the Trinity Dam is completed and a final determination has been made regarding public use requirements in the area.
>
> "It is recommended that the appeal be denied."

In view of the opposition expressed by the Bureau of Reclamation to restoration to mining location of the area involved, it will be rejected. Cf. Clyde A. Morgan, Walter F. Sager, A-27489 (October 24, 1957). See 43 CFR 185.36(c). Accordingly, the Manager's decision is affirmed.

Mr. Blakemore is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

(acting) Director

Enclosure

DISTRIBUTION:

Herbert S. Blakemore (Certified Mail)
Bureau of Reclamation (3)
Mineral Staff Officer (3)
Appeals List No. 1
WHW

appeal to Sec.
affirmed A-28479 LO (Sac)

DOCKET FILES

PUBLIC LANDS * 7 Withdrawals

MINING CLAIMS * 6 Lands Subject to

A petition for the restoration to mineral entry of land withdrawn for use of the U. S. Army Corps of Engineers in construction of a dam and reservoir project in a national forest is properly denied where mining operations would interfere with the purposes for which the land was withdrawn.

Francis N. Dlouhy, Sacramento 060152 (March 28, 1960)

5

In reply refer to:
Sacramento 060152
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 28, 1960

Certified Mail
Return Receipt Requested

DECISION

Francis N. Dlouhy : Petition for Restoration

Decision of the Manager Affirmed

Mr. Francis N. Dlouhy has appealed from the decision of the Manager, dated January 7, 1960, rejecting his petition for the restoration of certain lands to location under the United States mining laws for the stated reason that the U. S. Army Engineers have advised the Bureau that the lands are still required in connection with the Pine Flat Dam and Reservoir Project, California, for which they are withdrawn.

Pursuant to Public Land Orders No. 586 dated May 20, 1949 (14 F.R. 2797) and No. 1072 dated February 18, 1955 (20 F.R. 1176) the lands* were withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, for use in construction of the above-mentioned dam and reservoir project under the supervision of the Department of the Army. The U. S. Corps of Army Engineers has advised the Bureau that all of the Federal lands described in the appellant's petition are required in the master plan for the project as approved by the Chief, of Engineers, Department of the Army.

On appeal the appellant merely asserts that the lands are valuable for various enumerated minerals.

The Department has held that land withdrawn for reclamation purposes should not be opened to mineral location where mining operations would interfere with the purposes for which the land was withdrawn. The general and unsupported statements of the appellant are not conclusive evidence that the lands are important for their mineral content. In view of the report of the U. S. Corps of Army Engineers, it appears that the best interests of the United States would not be served by opening any part of the land involved to mineral location and that the petition for restoration was properly rejected. Clyde A. Morgan et al., A-27489 (October 24, 1957).

---

* The lands in issue are within the Sierra National Forest reserve, and the two cited public land orders each provide that the dam and reservoir construction project withdrawal did not modify the forest reservation, but took precedence over it.

Accordingly, the decision of the Manager is affirmed.

Mr. Francis N. Dlouhy is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed From 4-1365. If an appeal is taken, the amount of the filing fee will be $5.00. In taking an appeal, there must be strict compliance with the regulations.

If an appeal is taken by Mr. Francis Dlouhy, then the adverse party to be served is the:

District Engineer
U. S. Army Engineer District, Sacramento
Corps of Engineers
Post Office Box 1739
Sacramento 8, California

For the Director:

Enclosure

DISTRIBUTION:

Mr. Francis N. Dlouhy (Certified Mail)
Corps of U. S. Army Engineers (Regular Mail)
Regional Forester, Forest Service (Regular Mail)
Supervisor, Sierra National Forest (Regular Mail)
Lands Staff Officer
Minerals Staff Officer (3)
Appeals List No. 1
JHO'D

DOCKET FILES 0

DEPT. OF INTERIOR
SACRAMENTO, CAL.

FEB 15 10 00 AM 1961

PUBLIC LANDS * 8 Special Land-Use Permit

There is no requirement in the law or the regulations that a land office give advance notice to the permittee of a Special Land-Use Permit that an annual rental payment is due. On failure to pay the rent when due, the permittee is in default and it is proper to revoke the permit.

Joe Ver Duft, Fairbanks 012448 (January 11, 1961)

DOCKET FILES

affirmed

In reply refer to:
Fairbanks 012448
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 11, 1961

Certified Mail
Return Receipt Requested

DECISION

Joe Ver Duft : Special Land-Use Permit

Decision Affirmed

This is an appeal from a decision of the Chief, Lands Adjudication Division, Fairbanks Land Office, dated June 7, 1960, revoking the above-noted Special Land-Use Permit for breach of the conditions of the permit in that the permittee had failed to pay the annual rental for the fourth lease year due on March 5, 1960.

On July 1, 1960, the Land Office received a notice of appeal to the Director which enclosed, in addition to the $5.00 filing fee, $20 as payment for the fourth lease year. Appellant contends that the notice of rental due was never received because it was sent to the wrong address.

Regulation 43 CFR 258.7 provides in part: "A special land use permit may be issued for a period of not exceeding 5 years and will be revocable for any breach of condition thereof. * * *" Regulation 43 CFR 258.8(a) reads in pertinent part: "Each permittee will be required to pay to the Bureau of Land Management, in advance, the annual rental fixed by the permit, * * *." The Special Land-Use Permit in part specifically provides: " * * *(2) The permittee shall pay annually, in advance, to the manager as rental the sum of $20.00 dollars, * * *."

There is no requirement in the law or the regulations that a land office give advance notice to the permittee of a Special Land-Use Permit that an annual rental payment is due. The provision of the regulations that requires the permittee to pay the annual rental in advance is mandatory. In view of the authority to revoke the permit on breach of any conditions, it was proper to revoke the permit when permittee failed to pay the rent when due.

Accordingly, the decision of the land office is hereby affirmed.

Joe Ver Duft is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal the amount of the filing fee will be $5.00. If an appeal is taken there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:
Joe Ver Duft (Certified Mail)
Lands Staff Officer
Appeals List No. 1
JBJ

appeal to Sec
addl. evidence to support appl.
for Pat. to R. R. Grant land
affirmed in Part required

DOCKET FILES

A29037
10-17-62

PUBLIC LANDS * 1 Generally

In the absence of competent evidence of a transfer or grant from the railroad to an innocent purchaser for value, an application for a patent under subsection (b) section 321, Part II, Title III of the Transportation Act of 1940 (54 Stat. 954) was properly rejected.

However, where the applicant states that the conveyance was made on a specific date and it appears that the statement and other matters involved were apparently based upon some record, the applicant will be allowed thirty days in which to furnish additional evidence available surrounding the conveyance, failing in which the application will remain rejected.

Southern Pacific Company, Sacramento 060249 (February 1, 1961)

Affirmed

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Sacramento 060165
5.04g

April 14, 1961

DECISION

Francis N. Dlougy

Application for Restoration
to Mining Location

Case Remanded

This is an appeal from a portion of a decision of October 4, 1960 rejecting an application for restoration of certain lands in sec. 21, T. 12 S., R. 26 E., M.D.M., California. The decision was premised on a recommendation by the Bureau of Reclamation which recited that the lands are in an area of future project development potential and it is necessary to maintain safeguards in order that no silt, debris or deleterious substances or materials be permitted to enter or flow into the Kings River and any water entering the river from such operations shall be free from pollutents detrimental to aquatic life or public health; it was recommended that the lands be permitted for mining purposes and that any permit to be issued shall contain sufficient safeguards to prevent the silting etc., of the Kings River.

In the recent case of the United States v. Mrs. Reho Wolfe, A-28361 (August 18, 1960), it was pointed out that adequate remedies at law are available where a mining claimant seeks to interfere with established trails or roads. In Pacific Gas & Electric Co., et al., 66 I.D. 264 (1959) it was stated that pollution of a stream would itself be an insufficient cause for restricting operations under the act of August 11, 1955 for the police power of the sovereign government can effectively be used to control pollution. Similarly see U.S. v. Cohan, Idaho ML 292 and U.S. v. Butler, Idaho ML 293, both being Bureau decisions of December 16, 1960.

The agencies or bureau having jurisdiction of the subject lands should be apprized of the matters recited in the foregoing paragraph and in view thereof should be requested to furnish their further recommendations concerning the restoration of these lands to mineral entry. A new decision shall be rendered based on the recommendations then made. Inquiry should also be directed to the interested parties for the purpose of ascertaining whether further prosecution of the application is desired.

The case record is remanded through the Bureau's State Supervisor at Sacramento for further processing of the application in accordance with the instructions herein contained.

Appeals Officer

Enclosure

60

DISTRIBUTION:

Mrs. Francis N. Dlouhy (Regular Mail)
AA-1
SS (Sacramento)
LO (Sacramento)
Minerals Staff Officer (4)
Regional Directo (Regular Mail)
Regional Forester, (Regular Mail)
Forest Supervisor (Regular Mail)
Case File
Permanent File
Attorney's Reading File
AO Reading File
BF

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APR 24 1961
BUR. OF LAND MGMT.
LAND OFFICE
SACRAMENTO, CALIF.

6

Dismissed affirmed
~~See~~ A-28901 appeal to Sec
9-25-62

DEPT. OF INTERIOR
SACRAMENTO, CAL.
MAY 3 10 00 AM 1961
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Sacramento 052087 ✓
060870
5.04g

April 14, 1961

Certified Mail
Return Receipt Requested

DECISION

Keith M. Clark Robert B. Choate	:	Public Sale Application Valentine Scrip Application

Decision Rejecting Public Sale Application Affirmed
Valentine Scrip Application Rejected

Keith M. Clark has appealed from a decision dated June 28, 1960, rejecting his public sale application for the reason that the land applied for contains merchantable timber and that the public interest would best be served by retaining the land in Federal ownership for timber management purposes.

A conflicting Valentine scrip application, Sacramento 060870, has been forwarded to this office for consideration in connection with Mr. Clark's appeal. This application, filed by Robert B. Choate, Jr., Jean E. Choate, and Daniel F. Morton, embraces several of the subdivisions included in the public sale application. The merits of this application have been carefully reviewed along with the merits of the public sale application.

Both the public sale and scrip applications have been filed for lands in T. 11½ N., R. 3 E., H.M., California. This land lies in an area having a demonstrated need and potential for the assembly of public recreational sites. Two such sites, Point Reyes and King's Peak, are now under consideration.

3S 1W H
sv

2N 11W MD
sv

The highest and best use for the public domain in this area is for use in assembling recreational and public use sites in appropriate locations. The Bureau is implementing programs to study the lands involved and determine the best means for accomplishing this objective.

Consequently, it would not be in the public interest to transfer title to any of the lands involved until it is determined that this objective is being achieved by the proposed transfer.

Dick:

Point Reyes lies at 38°Lat; 122°Long.
it appears not to be surveyed
but what might be 2 N 11 W MD
King's Peak lies in 3 S 1 W. HM in
Sec. 36;it can be seen on Point Delgado
15 min. series quad.
Scotty V.

The subject transfers do not further this objective. The decision of the Manager rejecting the public sale application is, therefore, affirmed, and the Valentine scrip application is rejected.

Mr. Clark and the Valentine scrip applicants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken by Mr. Clark, then the adverse parties to be served are Robert B. Choate, Jr., Jean E. Choate, and Daniel F. Norton. Service on them may be effected by serving their attorneys McCutchen, Doyle, Brown & Enersen, 1500 Balfour Building, 351 California Street, San Francisco 4, California. If the scrip applicants take an appeal, then the adverse party to be served by them is Keith M. Clark, Route 2, Box 548, Hillsboro, Oregon.

A. H. Dunn

Appeals Officer

Enclosure

DISTRIBUTION:

Mr. Keith M. Clark (Certified Mail)
Robert B. Choate, Jr., Jean E. Choate, Daniel F. Norton (Regular Mail)
McCutchen, Doyle, Brown and Enersen, Attorneys at Law (Certified Mail)
Mr. Stephen B. Kahn (Regular Mail)
Mrs. A. W. Way (Regular Mail)
Mr. Frank Gorbet (Regular Mail)
Huber and Goodwin, Attorneys at Law (Regular Mail)
Lands Staff Officer
AA-1
SS (California)
LO (Sacramento)
Case File
Permanent File
Attorneys' Reading File
AO Reading File
[illegible]

DEPT. OF INTERIOR
SACRAMENTO, CAL.

MAY 3 10 00 AM 1961

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:

Sacramento 056134
6.05c

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 11, 1961

DECISION

Southern Pacific Company	:	Railroad Selection

Decision Reversed
Case Remanded

The above-named party has appealed from a decision, dated May 3, 1960, rejecting its above-identified application for patent under subsection (b) Section 321, Part II, Title III of the Transportation Act of 1940 (54 Stat. 954), embracing the E½NW¼ sec. 11, T. 17 N., R. 8 E., M.D.M., California. The application was rejected for the stated reason that the good faith on the part of the railroad's immediate transferee is questionable because he located placer mining claims on the land in issue and these acts were deemed to constitute an admission that he did not have valid title to the land.

The land was sold to Mr. K. J. Phelan, the purported innocent purchaser for value, on July 31, 1895, by the Central Pacific Railroad Company (changed to Central Pacific Railway Company), the appellant's predecessor in interest, as is evidenced by a photostatic copy of a deed contained in the record.

The mining claims were located in 1916, some 21 years after the sale of the land to Phelan. The location of the mining claims in 1916 does not impeach the bona fides of the railroad's immediate transferee as of the time he purchased the land.

The decision appealed from is, therefore, reversed, and the case is remanded to the Manager through the Bureau's office of the State Director for California for further appropriate action in the light of other governing criteria.

Richard J McCormick

Acting Chief, Division of Appeals

DISTRIBUTION:

Southern Pacific Company (Regular Mail)
Leonoudakis & Klien, Attorneys for Vincent and Elvira Bellett (Regular Mail)
Division of Minerals (4)
Division of Lands and Recreation
SD (California)
LO (Sacramento)
Case File
Permanent File
Attorneys' Reading File
Appeals Reading File
RBO

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SEP 19 1961
STATE OFFICE
BUR. OF LAND MGMT.
SACRAMENTO, CALIF.

appeal to Sec

affirmed A-28663 DOCKET FILES CA

3-19-62

PUBLIC LANDS * 3 Boundaries and Surveys

RULES OF PRACTICE * 8 Protests

The method by which a lost township corner shall be reestablished depends upon the circumstances of the individual case, and if there is evidence that the corner had been at a certain latitude, proportionate measurement along the north-south township line will not be resorted to, even though, the longitudinal position of the same corner being unknown, proportionate measurement has been employed along the east-west township line.

One who protests against the reestablishment of a township corner by a dependent resurvey must show that there is some identifiable point of land more likely to have been the location of the original corner than the particular site determined by the cadastral engineer, on the basis of the best available evidence, to have been the original corner

Lawrence H. Newton, 47-80036 (September 12, 1960)

RO

In reply refer to:

47-80036
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 12, 1960

Certified Mail
Return Receipt Requested

DECISION

Lawrence H. Newton : Protest Against Survey
:
:

Decision of Area Administrator Affirmed

Mr. Lawrence H. Newton has appealed from a decision rendered on August 31, 1959, by the Bureau of Land Management's Administrator for Area 1, dismissing his protest against the returns of a dependent resurvey of portions of the north and west boundaries of T. 46 N., R. 9 W., and of the south and east boundaries of T. 47 N., R. 10 W., M.D.M., California.

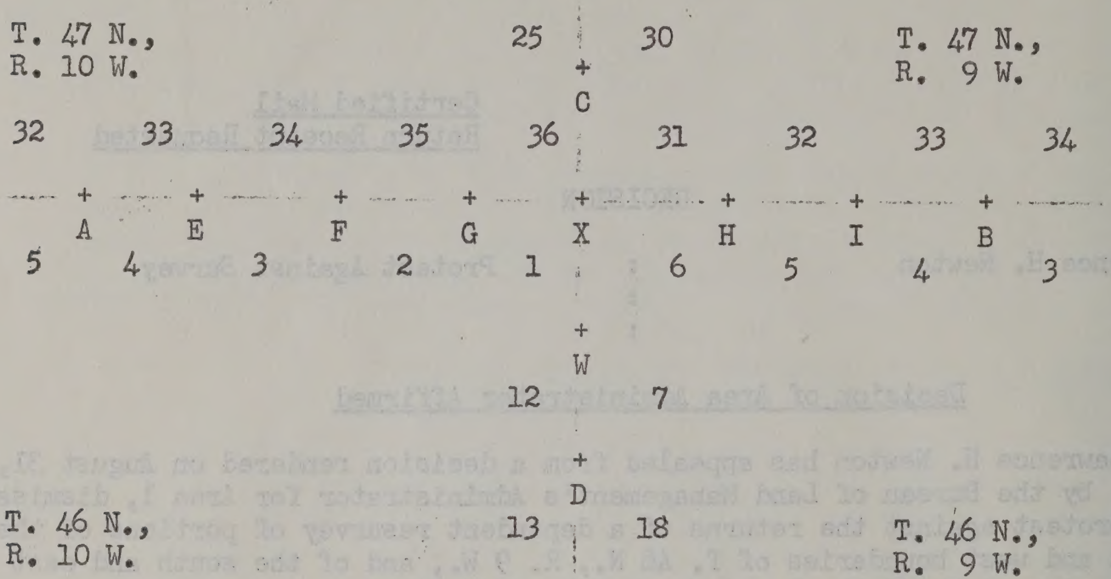
These boundaries had been originally surveyed by S. W. Foreman in 1883. The plat of survey showing the north and west boundaries of T. 46 N., R. 9 W., was approved on December 20, 1883; the plat showing the south and east boundaries of T. 47 N., R. 10 W., was approved on March 3, 1884.

The eastern half of the north boundary of T. 46 N., R. 9 W., was resurveyed in 1920; this resurvey was approved December 21, 1921, and accepted February 25, 1922. In this resurvey the corner of sections 3, 4, 33 and 34, Ts. 46 and 47 N., R. 9 W., as established in the original survey, was identified and remonumented.

In 1924, in connection with a resurvey of the boundaries of Tps. 46 N., R. 11 and 12 W., there was located, and officially marked on the ground, the corner for sections 4, 5, 32 and 33, Townships 46 and 47 N., R. 10 W. Although this corner is not depicted on any plat of survey, it is recorded on page 597 of Volume 408 of the official Bureau of Land Management Field Notes for the State of California. These field notes were approved on April 18, 1927; the resurvey was accepted June 30, 1927.

In 1958, at the request of the Forest Service, this Bureau undertook the dependent resurvey which is the object of Mr. Newton's protest. The purpose of the resurvey was to establish the common corner for Townships 46 and 47 N., R. 9 and 10 W., M.D.M., California.

The known points from which the cadastral engineer began to retrace the original survey are represented on the following schematic diagram as points A, B, C and D:



Point A represents the corner of sections 4, 5, 32, and 33, Ts. 46 and 47 N., R. 10 W., as restored in the dependent resurvey approved in 1927; point B represents the corner of sections 3,4, 33 and 34, Ts. 46 and 47 N., R. 9 W., as restored in the dependent resurvey approved in 1921. Point C represents the corner of sections 25, 30, 31 and 36, Ts. 47 N., Rs. 9 and 10 W., and Point D represents the corner of sections 7, 12, 13 and 18, Ts. 46 N., Rs. 9 and 10 W., each of which has been identified as having been established by S. W.Foreman in the original survey in 1883.

In the 1958 resurvey, the line between points A and B was retraced on the ground over what was deemed to have been its original location, and was appropriately monumented at each section corner along the township line. In this retracement, the length of the line AB was found to be somewhat less than reported in the record of the original survey; the corners on this line were reestablished at intervals proportional to those originally recorded. Thus, the section corners as located in 1958 are at distances which bear the same relation to the total length of line AB, as measured in 1958, as the section corners surveyed in 1883 bore to the length of the same line as measured by the original surveyor. This method of reestablishing corners along a line is known as single proportionate measurement. Manual of Surveying Instructions, 1947, United States Department of the Interior, Bureau of Land Management, secs. 364, 365.

When the line between points C and D was retraced, its length was found to be 284.30 chains - slightly over 3½ miles. Although the length of the same line, as given in the records for the 1883 survey, is three miles, the cadastral engineer in remonumenting the section corners along line CD, did not resort to proportionate measurement. Proceeding from the south at point D, he identified the original position for the ¼ section corner, secs. 7 and 12, and from that corner he established points W and X at 40.00 and 120.00 chains respectively, north of the last identified original corner on this line, in accordance with the distances recorded in the field notes of the original survey. This left the distance between points X and C at 125 chains- 45 chains more than the original plat of survey shows that distance to be.

The township corner as thus restored was submitted to the Director for his approval and acceptance; it is against the proposed approval of the resurvey that Mr. Newton has protested.

Mr. Newton's first contention is that point A does not accord in any way with the description of that corner appearing in the 1883 field notes, and can not, therefore, be a reliable guide to other corners established by the 1883 survey.

Point A was established by a survey approved in 1927. The 1927 survey was, as is the instant survey, a dependent resurvey - a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. After that survey was approved and accepted, the section corner established by it (i.e., pointA) was, in legal contemplation, and in fact, identical with the section corner established and described by the 1883 survey. J. M. Beard (On Rehearing), 52 L.D. 451 (1928). If, in 1927, or soon thereafter, the establishment of that corner had been protested, it would at that time have been proper to examine, from the point of view of technical accuracy, the extent to which the reestablished corner approximated the location of the original corner. The record of the reestablishment of the corner at point A, before the General Land Office at the time of approval and acceptance of the resurvey, was clear as to the identification of that corner. No protest was made contemporaneously with the 1927 resurvey, and the field notes of that survey being on their face regular, and the corners established by it being reasonably located, the Commissioner of the General Land Office properly concluded that this corner had been restored in its correct position from the best available evidence of the original survey. The Bureau will not now, after the passage of 33 years, attempt to reexamine the considerations, and the local traditions, which prompted the surveyor in 1927 to restore the corner in this particular position.

Accordingly, Mr. Newton's protest can be considered only insofar as it disputes the validity of the returns of the 1958 resurvey.

Mr. Newton's chief contention with respect to these returns is that the township corner should have been reestablished by a double proportionate measurement. In other words, just as line AB was proportionally divided so that each section would share the deficiency in length, so should line CD be proportionally divided, so that each section would share the surplus in length, and the township corner (X) should be positioned in proportion on both lines AB and CD. The protestant points out that section 367 of the Manual of Instructions for the Survey of Public Lands states that "the method of double proportionate measurement is generally applicable to the restoration of lost corners of four townships * * *."

However, it should be realized that the objective of the resurvey is the restoration of the corners in their true position from the best available evidence of the original survey. That may consist of physical evidence of the corner or its accessories; collateral evidence such as supplemental survey records, evidence of improvements related to the lines and corners of the survey, testimony of settlers having knowledge of conditions respecting the corners, etc. Reestablishment of a corner by proportionate measurement is a last resort and is employed where there is no other reasonable basis for determining the position of the corner; it is an attempt to locate by hypothesis what can not be located by the senses. There is no reason to establish corners by proportionate measurement where there remain on the ground indications of the actual places where these corners might have been. As the Area Administrator pointed out in his decision, there are such indications in this case, insofar as the latitudinal position of the township boundary is concerned.

In addition to several private surveys more or less agreeing with the corner as reestablished by the 1958 resurvey, there are in the area improvements dating from about the time of the original 1883 survey, erected by a person claiming to have obtained from the State title to the SE¼SE¼ sec. 36, T. 47 N., R. 10 W., M.D.M. If the township corner were established by a double proportionate method, these improvements would fall within sec. 1 of T. 46 N., R. 10 W.

Mr. Newton, in his appeal, does not dispute this, but merely states that there exist provisions protecting the property rights of a homesteader in such a situation. However, the location of the improvements is significant, not to show that the corner needs to be located to protect someone's property right, but to show that there is a good reason for believing that residents in the area at the time of the original survey considered certain lands to be in the township where the 1958 resurvey shows them to be, rather than in the township where Mr. Newton contends they should be.

Mr. Newton's other reasons for protesting the resurvey are that the reestablished township corners are inconsistent with certain interior section corners found by him, and are not evidenced by the bearing trees described in the original 1883 field notes.

With respect to the first contention, is is sufficient to state that, in an original survey, sections within a township are surveyed independently of, and subsequent to, the exterior boundaries of a township. Thus the location of an interior section corner has no probative value as to the location of a towhship line.

The second allegation, that the corners reestablished by the 1958 resurvey are not evidenced by the bearing trees described in the field notes for the 1883 survey, is true, but this does not require the rejection of the survey returns. It is in the very nature of a resurvey that all evidence of an original corner, including the original bearing trees, are entirely lost; the purpose of the resurvey is to determine where that corner probably was. In order for this Bureau to reject the returns of a resurvey, a protestant must show that the corner established by the cadastral engineer is not correct. H. M. Meloney, 47-72797 (September 22, 1958). To be acceptable, such a showing must be based not on conjecture, but upon a demonstration that there is some identifiable point of land more likely to have been the site of the original corner than the particular site chosen by the cadastral engineer. The appellant has not made such a showing.

Since the procedure prescribed by the Manual for reestablishing a corner was followed, and since the appellant has made no showing that the corner established thereby is not correct, the decision of the Area Administrator, dismissing the protest, is affirmed.

Mr. Newton is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. A copy of these regulations is enclosed (Form 4-1365). If an appeal is taken, the amount of the filing fee will be $5.00. In taking an appeal, there must be strict compliance with the regulations.

Edward Woozley
Director

DISTRIBUTION:

Mr. Lawrence H. Newton (Regular Mail)
Burton & Hennessy, Attorneys at Law (Certified Mail)
Cadastral Engineering Staff Officer (2)
Lands Staff Officer
Area Administrator Area 1.
Appeals List No. 1
MG

80657-60

appeal to Sec
affirmed A-29871
9-9-64

10-29-62

PUBLIC LANDS * 3 Boundaries and Surveys

* 9 Patents of public lands (Amendments)

An application to amend a patent for land issued in 1847 is properly rejected, where the purchaser had received all the land purchased and the location of the land conforms with the approved plat of survey.

Charles M. Noble, Jr. Ouachita Cash 8818 (La.)

In reply refer to:
6.05c
Ouachita Cash 8818 (Louisiana)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 29, 1962

Certified Mail
Return Receipt Requested

DECISION

Charles M. Noble, Jr. : Amendment of Patent
:
:

Decision Affirmed

Charles M. Noble, Jr. has appealed from a decision of the Field Services Land Office, dated June 11, 1962, rejecting his application for the amendment of patented entry No. 8818, issued to Colson Gaster on September 22, 1846, for the SW fractional $\frac{1}{4}$ (East of Boeuf River) of the SE fractional $\frac{1}{4}$ sec. 9, T. 15 N., R. 5 E., La. Mer., Louisiana, containing 51.80 acres. The decision states the plat of survey approved on July 12, 1839 designates the 51.80 acres in one legal subdivision and the plat does not contain a division line between the SW$\frac{1}{4}$SE$\frac{1}{4}$ and what would ordinarily be the fractional SE$\frac{1}{4}$SW$\frac{1}{4}$ east of the river.

The appellant alleges that:

1. From an examination of the plat it is evident the SW$\frac{1}{4}$SE$\frac{1}{4}$ of sec. 9 is not a fractional quarter-quarter section, as described in the patent but a full 40 acre quarter-quarter section; and while there is no line drawn on the map dividing the SW$\frac{1}{4}$ and the SE$\frac{1}{4}$ east of the Boeuf River, the survey field notes show that a quarter-section post was set on the south section line midway between the section corners; hence, any land lying between the river and a projected quarter-section line running north from the post should be described as a part of the SW$\frac{1}{4}$ of the section containing 11.80 acres.
2. The patent issued to Colson Gaster does not conform to the plat of survey upon which the right to patent is predicated.
3. The erroneous description in the patent record is misleading, and has caused considerable confusion, and should be corrected.

The appellant admits that no official survey was ever made of the interior of the tract of land involved.

The Manual of Surveying Instructions 1947, United States Department of the Interior, Bureau of Land Management, states that "Ordinarily an original survey of public lands does not ascertain boundaries; it CREATES them" (Sec. 563) (The emphasis appears in the text). And,"In the absence of evidence, the field notes and plat are the best means of identification of the survey and they will retain this purpose." (Sec. 565).

The boundaries of the subdivisions of the public lands established by the duly appointed Government surveyors, when approved by the surveyor-general and accepted by the Government are unchangable, (citing Circular March 3, 1883) State of Florida et al. v. Watson, 17 L.D. 88 (1893), except upon clear proof of fraud or gross error. Ralph E. May, C. S. McGhee, A-29014 (January 30, 1962). The Department has also held that a patent should not be issued for land under a technical subdivisional description not shown by the public survey. Elisha B. Mantias 16 L.D. 424 (1892).

The original Receiver's receipt No. 8818, in the case record, issued on September 22, 1846 states that Colson Gaster purchased the "South West Fract. qr. South East Fractional quarter of Section No. Nine in Township No. Fifteen North of Range No. Five East containing Fifty one-acres, and Eighty hundreth" for $64.75. The Register's receipt No. 8818, dated September 22, 1846, states Colson Gaster prrchased the "South west fractional quarter (East of the Beouf River) of the South East fractional quarter of Section No. Nine in Township No. Fifteen North of Range No. Five East containing Fifty one 80/100 acres" and "That, on presentation of this Certificate to the Commissioner of the General Land Office, the said Colson Gaster shall be entitled to receive a Patent for the lot above described." The patent, identified as Certificate No. 8818, issued on May 1, 1847, contains the same land description and it conveys the same quantity of land recited in the Register's Certificate.

The appellant admits that no adverse rights are involved in this appeal. Also, it is apparent from the appellant's statements on appeal that there is no discrepency between the location and the quantity of land purchased and the location and the quantity of land conveyed to Colson Gaster and therefore, he had received the "lot above described" in the registers receipt and the land described in the patent.

The purpose of a survey is to so subdivide the public lands that they may be readily identified. Thus, where the location and the extent of the subdivision is well known and where it does not appear that the interests of the successors in interest or of the United States render such course necessary, the disturbance of the survey at this late date is not justified. Melder v. White, 28 L.D. 412. 420 (1899).

Accordingly, where there is not the slightest intimation of irregularity or error disclosed by the record, it follows that an action which presumes to correct the record upon which the patent was based and to cancel that patent and issue another in lieu thereof, would be void and of no effect. Cf. Wright-Blodgett Company, 36 I.D. 238, 241 (1908).

Moreover, since the plat of survey does not describe any land in section 9, east of the Beouf River as being located in the $SW\frac{1}{4}$ of the section, an allowance of the appellant's request would entail considerable administrative and other expenses in the preparation of new survey plats. This action would, if anything, compound rather than resolve the confusion alleged to exist.

Therefore, the decision is affirmed.

Charles M. Noble, Jr. is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken the adverse party to be served is:

Robert B. Nation
2800 R. St. N.W.
Washington 7, D. C.

Richard J. McCormick
Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Samuel W. McIntosh, Attorney at Law (Certified Mail)
Charles M. Noble, Jr. (Regular Mail)
Robert B. Nation (Regular Mail)
Division of Engineering
Division of Lands and Recreation
Appeals List No. 1
MHS

Docket

appeal to Sec
affirmed A-29893
5-13-64

DOCKET FILES
12-6-62

RECEIVED
LAND OFFICE
SACRAMENTO, CALIF.
DEC 17 1962
A.M. 7 8 9 10 11 12 1 2 3 4 5 6 P.M.

WEB

Public Lands * (1) Generally (Private Land Claims)

Adjudication * (1) Generally (Construction of Statutes)

Where a pre-emption claimant for public land in the State of Louisiana, under the Act of June 15, 1832 (4 Stat. 534), fails to make payment therefor, pursuant to the provisions of the Act of April 24, 1820 (3 Stat. 566), no rights against the Government were acquired and the claim was properly rejected.

The Texaco Company, Francoise Pellerin et al., BLM-055314 (LA)

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LAND OFFICE
SACRAMENTO, CALIF.

DEC 17 1962
A.M. 7|8|9|10|11|12|1|2|3|4|5|6 P.M.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

In reply refer to:
6.05c
BLM - 055314 (LA)

December 6, 1962

Certified Mail
Return Receipt Requested

DECISION

The Texaco Company :
Francoise Pellerin :
Josephine R. Heinen :
M. R. Gallion, Protestant :

Private Land Claim

Decision Affirmed

The Texas Company has appealed from a decision, dated November 3, 1961, rejecting its application for the issuance of a patent for 714.30 acres of land, based upon the private land claim of Francoise Pellerin, widow of John Baptiste St. Marc Darby for land now described as section 59, T. 14 S., R. 9 E. Louisiana Meridian, Louisiana. The claim is predicated upon the report of the Old Board of Commissioners for the Western District of Orleans Territory under Certificate B No. 1477, pursuant to the authority of sec 4 of the act of March 3, 1807 (2 Stat. 440).

The decision held there is no evidence showing that the Pellerin Claim under Certificate B No. 1477 was ever located and satisfied by land in place; sec. 59, T. 14 S., R. 9 E., is shown as the double concession (or back preemption)[1] of John Baptiste St. Marc Darby for which no payment was ever made; and Surveyor General's Certificates of location Nos. 729 A, B, C, D, and E, for a total of 680.56 acres (equivalent to 800 arpens), were issued in full satisfaction of the Pellerin Claim.

The appellant makes some statements of fact and several allegations on appeal which because of the nature of this case are set out in some detail:

1. Texaco claims title to 289.30 acres of the 714.50 acres of land contained in sec. 59.
2. The Darby Claims are identified by the designations "A-1479" and "B-1477".
3. Claim A-1479 for 2,760.08 acres was confirmed, surveyed, and located in secs. 13 and 46, T. 14 S., R. 9 E.

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[1] A preemption in general terms is a special preference given to a claimant by which he may hold public land to the exclusion of others, dependent upon the performance of conditions. It is also known as a "pre-emption cash entry" for public lands.

4. Claim B-1477 was confirmed in 1811 but was not surveyed. However, the name "Saint Marc Darby" is written in at this location - now section 59.

5. "The township plot states that Sec. 59 is not public land but private land, being a "D" (double) "C" (concession) of John B. St. Marc Darby."

6. Although it was noted in a letter to the Surveyor General, dated March 10, 1858, that evidence of payment could not be found, the issuance of Certificate B-1477 was considered to satisfy the requirement for payment or it was considered to constitute a location in place as section 59.

7. There is a strong presumption that a confirmed grant is susceptible to a definite location, citing Northern Pacific Ry. Co. v. Smith, 31 L. D. 202 (1902).

8. A letter from the office of the Director of the Bureau of Land Management, dated November 19, 1958, confirms the conclusion that the claim was actually located in place as sec. 59, T. 14 S., R. 9 E., Louisiana Meridian, and the mere fact that scrip was issued does not defeat the right to a patent.

9. The Surveyor General's issuance of lieu certificates is related to his failure to recognize that the Darby and Pellerin claims were in fact one and the same.

10. Where a claimant has done all that is required under the law to perfect his claim to title against the government the government holds such title in trust for him.

In the adjudication of private claims, it is axiomatic that this Bureau must administer and be controlled by the laws of the United States as they are found in the statute books, and before the validity of any claim for public land can be recognized, it must appear that there has been full compliance with such laws. Jesse Fish 16 L. D. 550 (1893).

Section 2 of the Act of March 3, 1807 (2 Stat. 440) provides that persons in possession of land, not exceeding 2,000 acres, in the territories of Orleans or Louisiana, on December 20, 1803, for

10 consecutive years to that day, shall be confirmed in their titles to such tract of land. Under that Act the claim of John Baptiste St. Marc Darby was confirmed in his right to a tract of land on both sides of the Bayou Teche. This land was surveyed as sections 13 and 46 containing 2,644.83 acres. Thus, up to this time any additional land that may have purported to be a part of the original tract and claimed to be in the possession of Mr. Darby had no legal sanction under the laws of the United States.

The Act of April 24, 1820 (3 Stat. 566) provides in section 2 thereof that after July 1, 1820 a purchaser at a private sale shall produce to the register at the land office a receipt from the treasurer of the United States or from the receiver of public moneys of the district for the amount of the purchase money on any tract before he shall enter the same at the land office. Section 3 of the same act provides that no land shall be sold at either public or private sale for less than $1.25 an acre.

The Act of June 15, 1832 (4 Stat. 534) provides that persons whose claims for lands in the State of Louisiana were confirmed and such tract of land, bordering on any river, creek, bayou, or watercourse, does not exceed 40 arpens in depth, French measure:

> "* * * shall be entitled to a preference in becoming the purchaser[2] of any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpens, * * * at the same price and on the same terms and conditions as are, or may be, provided by law for the other public lands in the same state * * *." (underscoring added)

The 1832 Act, supra, also contains the following words of limitation:

> "* * * every person entitled to the benefit of this section shall, within three years after the date of this act, deliver to the register of the proper land office, a notice in writing, stating the situation and extent of the tract he wishes to purchase; and shall also make payment * * * for the same at the time * * * prescribed by law for the disposal of the other public lands in the state, at the time of his delivering the notice aforesaid * * * ." (underscoring added)

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[2] This preference right is commonly known as the "double concession" or "back preemption".

The 1832 Act, supra, then concludes with the following penalty provision:

> "* * * and if any such person shall fail to deliver such notice within the said period of three years, or to make such payment * * * his rights to pre-emption shall cease, and become void; and the land may, thereafter, be purchased by any other person * * * as * * * other public lands in the said state."

Thus, the Congress in effect stated that the described lands were public lands, that certain qualified persons were allowed a preference right to purchase those lands, and upon failure to comply with the terms prescribed by the Congress the pre-emption right shall cease and become void.[3]

The appellant admits there is no evidence of compliance with the mandatory provision for the payment required by the 1832 Act, supra.

The Act of June 2, 1858 (11 Stat. 294) confirmed the decisions in favor of land claimants made by the commissioners appointed to adjust private claims. This Act would have prefected confirmation B No. 1477, issued by the commissioners on September 13, 1811, except that again there is a requirement for payment and there is no evidence that the payment required to be made by section 3 of that Act was complied with. Section 2 of the 1858 Act, supra, confirming the decisions of the Commission, was repealed by the Act of June 21, 1860 (12 Stat. 866) and therefore, any action taken after June 21, 1860, to establish this claim in conformance with the provisions of sec. 2 of the 1858 Act cannot be considered in this appeal. Consequently, it appears that up to 1860 the pre-emption claimant had not yet established the validity of her claim as a matter of law.

The appellant contends that the issumnce of Certificate B-1477 satisfied the requirement for payment but no evidence was submitted showing that the certificate was ever intended to be more than the acknowledgment of a preference right or right of pre-emption. On the contrary, it has been held that the right does not become complete under the pre-emption law until the law has been complied with and the purchase money paid. Smith v. Custer et al., supra.

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[3] The Department has held it is clearly established doctrine that the pre-emption claimant acquires no rights to the public land until full compliance with and performance of all the conditions prescribed by the statutes and final payment. Smith v. Custer et al., 8 L. D. 269, 275 (1889).

Therefore, since the certificate cannot be construed as a "receipt" as required by the 1820 Act, supra, and it cannot be accepted as a location because the land was not surveyed on September 13, 1811, there is no merit to the allegation.

Moreover, Certificate B-1477 was not a completed grant, as alleged, because the claimant had not done all that was required under the law to perfect the claim to title and consequently, the Government does not hold the title to the subject land in trust for the claimant.

Accordingly, it appears that any scrip that may have been issued in satisfaction of claim B-1477 may have been issued in error.

The records of the Bureau, then the General Land Office, show that the Surveyor General of Louisiana in 1896 knew Madame Francoise Pellerin was the widow of John Baptiste St. Marc Darby.

The petition for the administration of the estate of Madame Francoise Pellerin, widow, filed for probate on March 4, 1896 reads, under the caption "Recapitulation", "Real estate. None _____." The document also shows that the Pellerin estate accepted scrip certificates Nos. 874A and 875A for 564 acres of land, in satisfaction of its claim under B-1477.

The statement in the letter from the Director's office, dated November 19, 1958, is not an admission by the Government that the claim was actually located in place as section 59. The statement is merely a conclusion that is not only refuted by substantial documentary evidence but also by the appellant's admission that evidence of payment could not be found. The failure to make proof of payment or submit any probative evidence that payment had in fact been made and that a receipt was issued for such payment is clearly the decisive fact in this case. Without such proof the Bureau is precluded from allowing the claim for the lands in section 59.

In view of the foregoing there is no legal or equitable merit in the appellant's claim and the decision is affirmed.

The protest of M. R. Gallion, oil and gas lessee BLM 046432, insofar as it relates to a purported violation of the departmental rules of practice by the appellant is without merit and it is dismissed. The remainder of the protest, as to the merits of the Pellerin claim requires no further comment in view of the ruling in this decision.

Mrs. Josephine Heinen who filed a petition for leave to join in the appeal of this case alleges therein that the Land Office decision of November 3, 1961, was adverse to her interest. However, there is nothing in the record to show the chain of title upon which her claim of title to sec 59 must be established. Therefore, Mrs. Heinen has not shown that she has any interest in this case and her protest is summarily dismissed.

The Texaco Company, Francoise Pellerin, and Mrs. Josephine Heinen are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken the adverse party to be served by each of them is:

M. R. Gallion
c/o Finlay Mac Lennon
Attorney at Law
1025 Connecticut Avenue, N.W.
Washington 6, D. C.

M. R. Gallion is also allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken the adverse parties to be served are:

The Texaco Company
Francoise Pellerin
c/o John J. Wilson
Attorney at Law
815 - 15th Street, N.W.
Washington 5, D. C.

Mrs. Josephine Heinen
c/o Lincoln J. Pitts
701 RCA Building
1725 K Street, N.W.
Washington 6, D. C.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

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John P. Warfield (Regular Mail)
Finlay MacLennon, Attorney at Law (Certified Mail)
M. R. Gallion (Regular Mail)
Lincoln J. Pitts, Attorney at Law (Certified Mail)
Mrs. Josephine Heinen (Regular Mail)
Hon. T. A. Thompson, House of Representatives
Division of Lands and Recreation
Appeals List No. 1
MHS

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In Reply Refer to:
[illegible]
Los Angeles [illegible]

June 7, 1961

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

[illegible]
[illegible] : Application to Purchase

SUPPLEMENTAL DECISION

On May 1, 1961 a decision was issued by this office reversing in part and affirming as modified in part the Field Office decision of [illegible] [illegible]

Application Los Angeles [illegible]

The May 1 decision is [illegible]

The third [illegible]

The last paragraph [illegible]

[illegible]

appeal to Sec
affirmed A-30060
9-9-64

DOCKET FILES

Veg

RECEIVED
JUN 10 1963
SACRAMENTO
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In Reply Refer to:
6.05c
Los Angeles 0170906 etc.

June 7, 1963

CERTIFIED MAIL
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We don't have

misc

DECISION

Harold J. Hansen Raymond J. Hansen	:	Applications to Purchase

Supplemental Decision

On May 3, 1963 a decision was issued by this office vacating in part and affirming as modified in part the field office decision of January 9, 1963. Jurisdiction was assumed over Los Angeles 0170912, a case not mentioned on the field office decision of January 9, and our May 3 decision disposed of this application to purchase by instructing the Bureau's Division of Field Services Land Office to consummate a sale.

Application Los Angeles 0170913 was specifically mentioned in the decision appealed from but disposition thereof was inadvertently omitted in our decision of May 3, 1963. This application is for purchase of Lot 4 Sec. 3, T. 16 S., R. 12 E., S.B.M., which consists of 17.80 acres. Appellants asserts only that tract 296, sec. 3 was patented June 19, 1914, lot 5, sec. 3 was patented January 30, 1914, and lot 1, sec. 3 was patented October 31, 1930. Bureau records reveal that the tract and lots, material to appellants' request for purchase, were not considered as entered land on March 3, 1909. Bureau records indicate that sales were consummated on March 28, 1914 for tract 296, June 16, 1910 for lot 5 and August 22, 1924 for lot 1, respectively. Thus it cannot be said that the tract, subject of purchase, abutted entered or patented land as of March 3, 1909.

Our May 3 decision is further corrected to read as follows:

The third full paragraph, page 2 is corrected to read in pertinent part, "The total acreage embraced in appellant's ten applications is 125.01 acres."

The last paragraph, page 5, is corrected to read in pertinent part, "Appellants are allowed the right of appeal to the Secretary of the Interior regarding applications, Los Angeles 0170907, 0170908, 0170909, 0170910, 0170913 and 0170923 * * * If the appeal covers all applications adversely affected by this decision the total filing fee is $30."

This decision does not in any way change the reasoning or result of the initial May 3 decision in the subject cases. The controlling date regarding the filing of a notice of appeal to the Secretary of the Interior as to cases disposed of by our May 3 decision will be the date the initial decision was received. However, the controlling date regarding the filing of a notice of appeal to the Secretary of the Interior as to Los Angeles 0170913 is the date this decision is received.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

DISTRIBUTION:

Harold J. Hansen and Raymond J. Hansen (Certified Mail)
Division of Lands & Recreation
SD (California)
LO (Riverside)
Appeals List No. 1
BRA

DOCKET FILES

In reply refer to:
6.05c
Sacramento 074622

T. OF INTERIOR
RAMENTO, CAL.
SEP 23 10 00 AM 1963
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 8, 1963

DECISION

Charles M. and Jessie B. Sipes	:	Application to purchase under Act of October 23, 1962

Application Rejected

The above-named applicants, on February 19, 1963, filed an application under the Act of October 23, 1962 (76 Stat. 1127) and the pertinent regulations (43 CFR Part 260) for land located in Sec. 4, T. 13 N., R. 10 E., MDM, formerly included in the Duncan Placer Mining Claim.

Contest No. 5834 was instituted against the mining claim and by decision dated October 4, 1961, the claim was declared null and void. The Sipeses did not appeal the decision.

Section 2 of the above-cited act provides that "For the purposes of this Act a qualified applicant is a residential occupant-owner, as of the date of enactment of this Act, of valuable improvements in an unpatented mining claim which constitutes for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than sever years prior to July 23, 1962."

The applicants were not, as of October 23, 1962, residential occupant-owners of valuable improvements in an unpatented mining claim. After the Duncan Placer Mining Claim had been declared null and void on October 4, 1961, it was no longer "an unpatented mining claim". It had been adjudicated an invalid mining claim and was, therefore, a nullity. An unpatented mining claim is a claim which has neither been adjudicated invalid nor patented. Therefore, the Duncan Placer Mining Claim could no longer be the basis on which Mr. and Mrs. Sipes could qualify under section 2 of the Act of October 23, 1962.

The application is, therefore, rejected.

The rejection of the application has no effect upon the classification for small tract lease of a portion of the above described land containing the Sipes' improvements. The land was classified for "lease only" by Sacramento District Order No. C4-2 dated April 27, 1962, pursuant to small tract application, Sacramento 059323, of Mr. Sipes.

This decision constitutes a final administrative determination in the matter. 43 CFR 221.31.

L Hoffman

Assistant Director

Approved: September 13, 1963

John A Carver Jr

Assistant Secretary of the Interior

DISTRIBUTION

Charles M. and Jessie B. Sipes
Hon. Harold T. (Bizz) Johnson, House of Representatives
Chamberlain & Chamberlain, Attorneys at Law
Appeals List No. 1
CLH

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NEC. ACTION

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SEP 24 1963
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LAND OFFICE

DOCKET FILES

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C., 20240

In reply refer to:
6.05c
Sacramento 074590
074610

September 6, 1963

DECISION

L. P. Gizinos :
Frank F. Myers :

Public Law 87-851

Decisions Affirmed

The above-named claimants have appealed from separate decisions, dated April 5, 1963, rejecting their applications for lands containing valuable improvements on unpatented mining claims, under Public Law 87-851 (Act of October 23, 1962; 72 Stat. 1127). The applications were rejected because the mining claims were declared null and void in 1958, therefore, the applicants were not qualified residential occupant-owners as of October 23, 1962, as required by Section 1 of the Act, supra, and 43 CFR 260.2(a).

Mr. Gizinos alleges that he was the occupant-owner of a valid mining claim until it was nullified by the Bureau. Mr. Myers alleges that he was in possession of his mining claim for 25 years when he relinquished on a threat of dispossession and a promise of a 5 acre tract which would include his "house, garage, well, garden spot, etc."

Title to public lands can only be acquired under acts of Congress which provide for the disposition of such lands. Deffeback v. Hawks, 115 U. S. 392, 407 (1885). The applicants' occupation of their respective mining claims were not authorized by law from 1958, when their claims were declared null and void, until October 23, 1962, when the residential occupation by unpatented mining claimants was authorized by law only to qualified occupants.

Accordingly, the decisions must be and are hereby affirmed.

This decision is without prejudice to the consideration of the appellants' pending applications under the Small Tract Law (43 U.S.C. 682a), describing substantially the same lands which are involved in these applications on appeal.

This decision constitutes a final administrative determination of these matters. See 43 CFR 221.31.

L T Hoffman
Assistant Director

Approved: September 13, 1963

John A. Carver Jr.
Assistant Secretary of the Interior

DISTRIBUTION

L. P. Gizinos
Frank F. Myers
Division of Lands and Recreation
Appeals List No. 1
MHS

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SEP 23 1963
SACRAMENTO, CALIF.

affirmed A-30174 11-30-65 appeal to Sec

DOCKET FILE

In reply refer to:
6.05c
Sacramento 075379

DEPT. OF INTERIOR
SACRAMENTO, CAL.
OCT 14 10 00 AM 1963
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

September 27, 1963

Certified Mail
Return Receipt Requested

DECISION

Claude M. and Lenore E. Murphy : Public Law 87-851

Decision Affirmed

Claude M. and Lenore E. Murphy have appealed from the May 14, 1963, decision of the Manager, Sacramento Land Office, rejecting their application to purchase, under the provisions of the Act of October 23, 1962 (76 Stat. 1127), land that was once a part of the Victory I, II and III unpatented mining claims.

The Manager stated that the Victory I, II and III unpatented mining claims were declared null and void by a decision of January 22, 1960, from which no appeal was taken, and that they, therefore, ceased to exist when that decision became final. He held, accordingly, that the Murphys are not qualified applicants because they were not, on October 23, 1962, resident occupant-owners of an unpatented mining claim as required by the law.

On September 13, 1963, the Assistant Secretary of the Interior approved two decisions issued by the Assistant Director, Bureau of Land Management, Charles M. and Jessie B. Sipes, Sacramento 074622 (July 8, 1963), and L. P. Gizinos, Frank F. Myers, Sacramento 074590, 074610 (September 6, 1963). Those decisions constituted final administrative determination by the Department of the Interior of the issues therein decided. In both of these factually related cases, the action taken by the Manager in the instant case was sustained.

Accordingly, the Manager's decision is affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of proving, by presenting substantial affirmative evidence, that this decision is erroneous.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Chamberlain and Chamberlain, Attorneys for the appellants (Certified Mail)
Claude M. and Lenore E. Murphy
Hon. Harold T. Johnson, House of Representatives
Division of Lands and Recreation
Appeals List No. 1
LLM

appeal to Sec

DOCKET FILES

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1963 NOV 14 PM 2 01

In reply refer to:
6.05c
Timber Sale
14-11-0001-(2)-81
(California)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

November 12, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Main Lumber Company : Timber Sale

Decision Affirmed

The Main Lumber Company has appealed to the Director from a letter-decision of the Bureau's District Manager, Redding California, dated August 14, 1963, rejecting its request for a refund in the sum of $11,357.00, purportedly resulting from a shortage in the estimated volume of timber described in the above-cited contract of sale. The reason for rejecting the Company's request is that Section 3 of the contract provides that the purchaser is not entitled to a refund even though the amount of timber, actually cut or removed or designated for taking is more or less than the estimated volumes shown in the contract.

The appellant alleges as follows:

1. It had been damaged by reliance upon the representations of volume.

2. The discrepancy between the actual deliveries and the volume represented amounts to 44%.

3. Prior to entering into the contract it had no separate information concerning volume and it relied solely upon the volume figures stated in the notice of sale.

4. It was "required to submit a bid of no 'less than the appraised price on a unit basis'."

5. A stump cruise made by the appellant establishes the nature and extent of the descrepancy.

6. It was entitled to rely upon the representations and it is entitled to relief under the law.

The appellant requests that it be granted a hearing.

The notice of timber sale published in the local newspaper states, in part, that:

> ". . .Before bids are submitted, full information concerning the timber, the conditions of sale, and the submission of bids should be obtained from the . . . District Manager. . . . All timber

> designated for cutting on [land description] [is] estimated for the purpose of this sale to be [statement of volumes] . . . . No bid for less than . . . $24,895.10 will be considered. . . ."

The prospectus for the proposed timber sale, dated May 5, 1961, contains the following statement:

> "The following volumes given below are estimates and may be more or or less than the actual amounts.

* * * * *

"Volume and Appraised Prices:

Species	Est. Volume m bd. ft.	. . .	. . .
Marked Douglas Fir	853		
Marked Ponderosa Pine	472		
Marked Incense Cedar	10		
Marked Sound Pine Snags	5		
	1,340 m bd. ft.	. . .	. . .

The Main Lumber Company submitted a sealed bid of $25,561.80. This was $666.70 more than the appraised price.

The record shows that 662 trees were marked for cutting in the subject sale area. The stump cruise, submitted by the appellant, shows that 657 trees were cut and 4 of the marked trees were not felled. Thus, there is a difference in the tree count of only one tree.

A memorandum in the case file, reporting an interview with the officials of the Main Lumber Company on August 28, 1963, contains the following statement:

> ". . .Mr. Thurman [superintendant or foreman of the Main Lumber Company] stated with assurance that Company representatives looked the sale over prior to bidding and judged at that time that the BLM estimate was high."

The admission by one of the officials of the appellant company that it had inspected the sale area, the bid in excess of the minimum bid price, and the fact that the published notice of sale, the prospectus and the contract state in four separate places that the volumes given were an "estimate", is sufficient to establish that no representations of quantity were made by the Bureau of Land Management and that the company did not rely and had no basis for relying upon any alleged representations.

A stump cruise cannot possibly, under the facts in this case, establish any discrepancy in fact or in law. The attorneys for the appellant are attempting to disprove primary evidence by the use of secondary evidence. This is not permissible. The measurement of the standing timber is the best and the most accurate method of determining the volume, particularly where there was no significant discrepancy in the tree count. Moreover, the court has concurred with the consistent holdings of the Department, that in a lump sum timber sale, "even if it is accepted as true that the defendant's estimate was incorrect. . .this does not, as a matter of law, entitle the plaintiff to recover." Russell & Pugh Lumber Company v. The United States, 290 F. 2d 938. Consequently, the stump cruise, which in this case consists entirely of secondary evidence, cannot establish the nature and extent of any discrepancy, and it cannot be considered in this case. And finally, what are said to be "the actual deliveries" to the log mill do not establish what was removed from the sale area.

The appellant requests an opportunity to present at a hearing the testimony of other timber companies for the purpose of showing that there is something wrong with the Bureau's method of cruising timber. The Bureau's timber cruising methods are not and cannot be the issue in this case. Landreth Timber Company, Inc., A-28861 (October 19, 1961). The only issue in this case is whether the Government violated the terms of its contract with the Main Lumber Company. The appellant has not submitted any probative evidence showing that the tree scale was grossly inaccurate. See Cascades Plywood Corporation, A-28547 (January 31, 1961). In fact, the appellant is attempting to pass on to the Government the company's responsibility to make its own determination of the estimated volume of timber. Even worse, if there was any error, the appellant cannot tell, from the information it submitted, whether the Government's measurements were wrong, whether the mill measurements were wrong, or whether all the timber removed from the sale area was delivered to the mill. Thus, it is obvious that a hearing, if granted, could be decisive of nothing. Consequently, the request for a hearing is denied. Cf. Margaret A. Andrews et al., 64 I.D. 9 (1957).

Accordingly, the decision appealed from is affirmed.

Main Lumber Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Carr and Kennedy, Attorney at Law (Certified Mail)
Main Lumber Company
Division of Forest Management
Appeals List No. 1
MHS

[illegible]

[illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

DECISION

[illegible]

[illegible]

[illegible]

[illegible]

1. [illegible]

2. [illegible]

3. [illegible]

4. [illegible]

5. [illegible]

[illegible]

[illegible]

of the Office [illegible] to [illegible]. In taking an appeal, there must be strict compliance with the regulations. If an appeal is taken the [illegible] must [illegible] the [illegible] of [illegible], by [illegible] [illegible] and [illegible] statement, showing why the decision appealed from is in error.

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
[illegible], Attorney at Law (Certified Mail)
Chief, [illegible]
Division of [illegible] Management
Appeals File No. [illegible]
[illegible]

POCKET FILES

In reply refer to:
6.05c
Los Angeles 0115582

DEPT. OF INTERIOR
SACRAMENTO, CAL.
APR 27 10 00 AM
BUREAU OF
LAND MANAGEMENT

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 8, 1964

DECISION

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Delbert J. Sargent : Special Land Use Permit

Decision Affirmed as Modified

Delbert J. Sargent has appealed from the decision of the Riverside Land Office, dated June 5, 1963, [1] granting him a renewed special land use permit for one year, ending June 17, 1964, instead of the five year period he had requested. The land use involves a 30-acre tract upon which he has facilities for the breeding and raising of tropical fish and aquatic plants. The decision also rejected his application for the use of 30 additional acres to be devoted to the same use.

The appellant alleges as follows:

1. He has been leasing the 30-acre tract for 9 years and the failure to grant the requested 5-year lease imposes an extreme hardship upon him "and gives no regard to the $60,000 appellant has invested in the said lands".

2. The action of the Bureau in selling the adjoining 70 acres of land to the County was an arbitrary act.

3. The true value of the land exceeds the sale price of $2.50 per acre.

4. "/T/hat an act of fraud may have been committed in connection with the subject transaction."

5. "/T/here may have been a conspiracy in connection with the subject transaction, directly adverse to the apellant's interests."

Imperial County has applied to purchase 570.62 acres of land for use by the general public as a park (Los Angeles 0164346), pursuant to the provisions of the Recreation and Public Purposes Act (43 U.S.C. 869) and the applicable regulations 43 CFR Part 2232, 29 F.R. 4420, March 31, 1964, (formerly 43 CFR Part 254). This application includes the lands described in the appellant's special land use permit and those additional lands applied for but denied to him. This parcel of land adjoins a patented 71.28 acre tract presently being developed by Imperial County for public use as a Hot Mineral Spa. A State Exchange Application (Los Angeles 0133945) for 220.15 acres of land, including the lands used by the appellant, was withdrawn by the State on February 6, 1964, "for the purpose of eliminating the conflict with the application of the County of Imperial, filed for this and other lands." The entire 570.62 acre tract has been classified for conveyance to Imperial County under the Recreation and Public Purposes Act. Therefore, the only interested applicants now involved are Imperial County and Delbert J. Sargent.

---

[1] This decision was corrected as to the land description by a decision of July 2, 1963.

The permit, as issued in 1955, specifies that the purpose of the land use was for construction of "earthen ponds in which to breed and raise tropical fish and aquatic plants."

Further, the permit contained a special stipulation that:

> "(2) This permit, . . . does not authorize use of the land for residence construction or other purposes not necessary for and directly connected with the purpose for which the permit is issued."

The permit was renewed several times over a nine-year period for the convenience of the permittee, subject to the provisions of regulations 43 CFR 2236.0-3 et seq., 29 F.R. 4302, March 31, 1964, (formerly 43 CFR 258.1 et seq).

Departmental regulations provide that:

> "A special land-use permit . . . will be revocable in the discretion of the authorized officer, at any time, upon notice, if in his judgment the lands should be devoted to another use. . . ."(43 CFR 2236.2-1, 29 F.R. 4455, March 31, 1964, (formerly 43 CFR 258.7).)
>
> "A special land-use permit will be subject to . . . the filing of applications and the acquisition of rights of others, as follows:
>
> (1) "Applications . . . may be made under nonmineral laws, subject to the revocation of the permit." (43 CFR 2236.0-7(b), 29 F.R. 4455, March 31, 1964, (formerly 43 CFR 258.10).)

A departmental decision, construing the above regulations states that a special land use permit is by its terms revocable at will and gives the permittee no rights in the land. Cf. Everett H. Adkins, A-28245 (May 23, 1960).

In view of the foregoing, the appellant had ample notice that the permits issued to him were subject to revocation at any time and to non-renewal. Therefore, any improvements placed upon the land by the permittee were constructed at his own risk.

Moreover, departmental regulation 43 CFR 2236.0-2(a), 29 F.R. 4454, March 31, 1964, (formerly 43 CFR 258.2(a)) contains the following prohibition:

> ". . . Permits for . . . special use *will not be issued* . . . *in any case* where the provisions of the existing public land laws may be invoked. For example, they will not be issued to authorize the use of public lands for home . . . or business sites for which leases may be issued under the act of June 1, 1938 [small tract act] . . . ." (Emphasis added)

Notwithstanding the mandatory language of the regulations and the express limitations placed in the permit, the permittee nevertheless constructed "residences, packing shed", "canals", "houses", "pipelines" and a "cesspool".

Mr. Sargent's continued use of the lands for private residence and for the maintenance and operation of a business obviously not temporary in nature is not in accordance with the prohibitions which have been placed upon the issuance of special land use permits. In addition, the use of the land by the permittee for these purposes is inconsistent with the planned use of the land by Imperial County as a public park.

Where the interest of the general public requires the use of its public land, that interest must be deemed paramount to that of any special land use permittee.

On May 31, 1961, the Secretary of the Interior established a program to encourage the construction of public facilities for park or other recreational purposes. Under this program, lands will be sold at $2.50 per acre, or leased at 25 cents per acre under the Recreation and Public Purposes Act, provided that the grantees meet certain standards of performance. Therefore, the sale price does not purport to reflect the true market value of the land and there is no price irregularity involved.

The appellant has submitted no evidence to support his charges of fraud or conspiracy. It is apparent from the record that there is no basis whatsoever for either charge.

Therefore, the special land use permit is revoked as of the 30th day following receipt of this decision by Mr. Sargent.

Accordingly, the Land Office decision is affirmed as herein modified and the case is remanded to the State Director for appropriate action consistent with this decision.

This decision constitutes a final administrative determination by the Department in this matter. See 43 CFR 1844.1 29,F.R. 4328, March 31, 1964, (formerly 43 CFR 221.31).

H R Hochmuth

Associate Director

Approved: April 22, 1964

Assistant Secretary of the Interior

DISTRIBUTION

Delbert L. Sargent (Certified Mail)
Hon. Pat M. Martin, House of Representatives
Board of Supervisors, Imperial County, El Centro, Calif.
Division of Lands and Recreation
Appeals List No. 1
MHS
Mr. Philip F. Dodson, Attorney at Law (Certified Mail)

DOCKET FILES

In reply refer to:
6.05c
Fairbanks 030685

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

APR 27 10 44 AM
BUREAU OF
LAND MANAGEMENT

April 21, 1964

Certified Mail
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DECISION

John D. Irwin : Homesite

Decision Affirmed

John D. Irwin has appealed to the Director from a decision of the Fairbanks Land Office, dated July 31, 1963. It rejected his homesite notice of location, filed on February 4, 1963, for the reason that the State of Alaska had filed a State selection on October 11, 1962 which segregated the land from entry. The decision also states Mr. Irwin claims settlement upon the land on June 10, 1962, and the regulation governing the filing of such notices clearly states that unless the notice of location is filed within 90 days from the date of settlement, no credit can be given for any occupancy prior to the date of filing of the notice of settlement.

The appellant alleges that prior to June 10, 1962 a Mr. S. H. Klinke had filed for a trade and manufacturing site claim and, on June 10, 1962, Mr. Klinke sold a part of this land to the appellant and promised to deed this land to Mr. Irwin when he, Klinke, received the title to the land. The appellant built improvements on the land and resided there continuously since June 10, 1962. On February 4, 1963 Mr. Irwin ascertained from the Fairbanks Land Office that the purchase from Klinke did not give him any interest in the land. Thereupon, he filed the application for a homesite. The appellant also alleges that he resided on the land in good faith and, therefore, is entitled to a finding that his claim has priority over the State of Alaska's application.

The appellant's statement of reasons for appeal establishes conclusively that his rights, if any, were derived through Mr. Klinke. The appellant's occupation from June 10, 1962 until February 4, 1963 was not intended to be a "settlement" upon "unreserved public land" pursuant to the Homesite Act of May 26, 1934 (48 U.S.C. 461). Thus, the appellant's occupancy was not and could not be considered to have been in the nature of an assertion of a legal claim and he was not entitled to claim the 90-day benefit accorded settlers by 43 CFR 2233.9-2(b), 29 F.R. 4425, March 31, 1964 (formerly 43 CFR 64.8). Therefore, since Mr. Klinke had no conveyable interest in the land and the occupancy did not purport to be under any of the public land laws, such occupancy was in the nature of a trespass. Consequently, there is no merit to the allegation of a prior claim and the issue of the so-called late filing of the notice of location is not relevant to this case.

The appellant should have ascertained the legal status of the land, prior to his occupancy on June 10, 1962. For this reason no consideration can be given to his allegation that he had resided on the land in good faith. Blunson v. Knighton, (La.) 140 So. 302, 307.

Accordingly, the decision is affirmed.

The appellant may be able to secure the desired relief by purchasing the subject land directly from the State of Alaska, after the land has been patented to the State.

John D. Irwin is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840, 29 F.R. 4326, March 31, 1964 (formerly 43 CFR Part 221). See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

In the event an appeal is taken from this decision, the adverse party to be served with notice is:

State of Alaska
Commissioner of Lands
333 "D" Street
Anchorage, Alaska

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION
George M. Yeager, Attorney (Certified Mail)
John D. Irwin
Commissioner of Lands, State of Alaska
Division of Lands and Recreation
Appeals List No. 1
MHS

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DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 APR 30 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
6.05c
Riverside 02137

April 23, 1964

DECISION

William A. Kensinger : Airport Lease

Decision Reversed

William A. Kensinger has appealed from a decision of the Riverside Land Office, dated May 3, 1963, rejecting his application for an airport lease embracing 400 acres of land for the reasons that the U.S. Naval Ordnance Laboratory in Corona, California has objected to the use of the lands as an airport which would introduce automobiles, utilities and other disturbances tending to preclude using the area for testing purposes and because the subject lands are covered by a number of unpatented mining claims that would require considerable time and expense in validity determinations and possible contest action.

The appellant alleges as follows:

1. There is no apparent indication that the required assessment work is being done on the mining claims.

2. There is already considerable aircraft traffic in the area.

3. "The remoteness and absence of power, phone and other installations are the contributing factors also for my choice of this site. My aim is for a small private airport; I have no intentions to develope into a large public airport as this would be detrimental to my program of training glider pilots."

The Federal Aviation Agency states that an airport is desirable at this location, but it suggests that the amount of land, for the size airport proposed, is excessive. The Agency recommends an area embracing 320 acres, described as the N$\frac{1}{2}$ Sec. 8, T. 4 N., R. 3 E., S.B.M.

While the U.S. Naval Ordnance Laboratory states that gliding activities, as such, would not be detrimental to their operation and that the operation of light aircraft could be tolerated, it does object to the construction of motels, restaurants, and similar facilities which would require power and telephone lines. It also objects to anything that would bring many people into the immediate area and thereby result in a considerably increased ignition noise environment from automobiles.

There is nothing in the case record which establishes that the proposed use of the land for training glider pilots is objectionable. Nor, is there any indication that the cost of a validity determination would be excessive. Under such circumstances, the rejection of the application for an airport lease for the reasons stated was premature.

Moreover, the case record contains no express provision for public use of the contemplated airport facility. On the contrary, indication of record suggest its use as a private airport only. No authority exists for leasing public lands for private airport purposes exclusively.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

DISTRIBUTION
William A. Kensinger
Division of Lands & Recreation
Appeals List No. 1
MBS
DDRF 1

appeal to Sec

DOCKET FILES

Headquarters Sites: Generally--Applications

An application to purchase a headquarters site, filed by an heir of the original claimant, will be rejected, where the heir fails to show in the application actual use and occupancy of the land or the trade, business, or productive industry in which he or his employer is engaged, and where he fails to show there are improvements on the land, or his right to ownership of any improvements that might be on the land.

Severin F. Ulmer, Fairbanks 021036 (September 29, 1964)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 OCT 7 AM 10 00

In reply refer to:
704
Fairbanks 021036
September 29, 1964
Certified Mail
Return Receipt Requested

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

DECISION

Severin F. Ulmer,
Heir of Joseph Ulmer,
deceased

Headquarters Site Claim
Application to Purchase

Application to Purchase Rejected

On September 17, 1958, Joseph Ulmer filed a notice of location of the above-identified headquarters site claim. Joseph Ulmer passed away on October 13, 1959, without having filed an application for the purchase of the headquarters site claim. He left one heir, Severin F. Ulmer, the applicant herein.

On December 4, 1963, Severin F. Ulmer filed an application to purchase the claim, as heir of Joseph Ulmer, claiming whatever rights and interests his father had acquired in the site.

In this case the heir does not succeed to an interest in the land, but he succeeds, if at all, only to the rights of possession of whatever improvements his ancestor left, and may be substituted in making application for purchase. Since the heir can receive no more than the ancestor had, his application must be judged by the same statutory and regulatory criteria that would have been applied to the ancestor's application had he lived.

Such applications are governed by that part of the Act of March 3, 1927, 1/ providing they be made under "rules and regulations to be prescribed by the Secretary of the Interior." The regulations implementing the Act provide in pertinent part that:

> /A/n application . . . must show the following facts:
>
> 1. . . . .
> 2. The actual use and occupancy of the land for which application is made . . . . .
> 3. . . . . .
> 4. The nature of the trade, business, or productive industry in which applicant or his employer . . . is engaged.

1/ 44 Stat. 1364, as amended, (48 U.S.C., 1958 ed., 461).

5. . . . . . .

6. That no portion of the tract applied for is occupied or reserved for any purpose by the United States, or occupied or claimed by any natives of Alaska, or occupied as a town site or missionary station or reserved from sale, and that the tract does not include improvements made by or in possession of another person, association, or corporation. 2/

Thus, allowance of the heir's application depends upon his showing of the required facts. His failure to satisfy these prerequisites underlies the cancellation of the claim.

Specifically, the record fails to reveal "actual use and occupancy" of the land by the heir. Nor does his application list the "trade, business, or productive industry in which [he] . . . is engaged." The use of the present tense underlies the requirement of a continuing business need for the land. The heir has shown no such need. Since the ancestor himself would have been bound to demonstrate this need, so also should the heir who, as stated earlier, succeeds not to the land but to the right to pursue the application to purchase.

Finally, the heir's application fails to indicate the source and ownership of the improvements on the land. The applicant must show "that the tract does not include improvements made by or in possession of another person, association, or corporation." His father merely listed several buildings as being on the entry. The heir refers to that list in his application. Neither indicated who made or possessed these improvements, nor does the heir's application show whether any improvements are now on the land, or his right to claim those improvements.

Because of the failure to conform to the applicable law and regulations thereunder, the heir's application must be, and is hereby rejected. 3/

Mr. Severin F. Ulmer is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

H.R. Hochmuth

Associate Director

Enclosures

2/ 43 CFR 2233.9-1(e) (April, 1964 Supp.)

3/ Under the supervisory authority vested in him the Director may assume jurisdiction of any matter involving a land case pending in a land office and dispose of it without waiting for a decision by the local land office. Cf. Barney R. Colson, 70 I.D. 409 (1963).

DISTRIBUTION

Mr. Severin F. Ulmer
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
RBO

Appeals Procedure: Dismissal 1840

Where a statement of reasons or a request for an extension of time within which to file a statement of reasons is not transmitted to the proper office within the time required, the appeal will be summarily dismissed.

Dr. Curtis H. Springer Foundation, Los Angeles 0153617 and 0158843
(November 18, 1964)

DOCKET FILES

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1964 NOV 30 AM 10 00

In reply refer to:
704
Los Angeles 0153617
0158843

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

November 18, 1964

Certified Mail
Return Receipt Requested

DECISION

Dr. Curtis H. Springer Foundation : Recreation and Public Purposes Applications

Appeal Dismissed

The Dr. Curtis H. Springer Foundation has appealed from a decision of the Riverside District and Land Office dated September 4, 1964, rejecting its above-identified applications to purchase and lease certain public lands described therein pursuant to the Recreation and Public Purposes Act of June 14, 1926, as amended (43 U.S.C., 1958 ed., sec. 869).

The notice of appeal was filed in the land office on October 5, 1964. The statement of reasons for the appeal was not placed in the mails to be transmitted to the Director, Bureau of Land Management, until November 10, 1964, which was after the expiration of the 30-day period allowed for filing the statement of reasons, as provided for by the applicable regulation, 43 CFR 1842.5-1.

In an accompanying letter, appellant requests that the statement of reasons be accepted even though the statement was not transmitted until after the 30-day period for filing it had expired. Appellant asserts that its officers had become concerned over not having received a ruling from the Internal Revenue Service as to its tax-exempt status prior to filing the statement of reasons and overlooked the time period for filing such statement. The ruling from Internal Revenue Service was sought by the appellant for use by the Bureau of Land Management in considering its qualifications as an applicant under the Recreation and Public Purposes Act. Appellant requests that a decision on the appeal be deferred until it can obtain the above-mentioned ruling from the Internal Revenue Service.

Although the appellant's request for a stay of action on the appeal could have been considered as a request for an extension of time within which to file a statement of reasons in support of the appeal, such a request, in order to be acceptable, must have been filed within the time allowed for the filing of the statement of reasons itself. 43 CFR 1840.0-6(g)(1) and (2).

It is not possible in the instant case to accept the statement of reasons including the request for stay of action (extension of time), since it was not transmitted to this office until after the 30-day period allowed had expired, and the delay in filing cannot be waived. 43 CFR 1840.0-6(b).

Therefore, the appeal must be and is hereby summarily dismissed. 43 CFR 1840.0-7.

The Dr. Curtis H. Springer Foundation is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers both applications adversely affected by this decision the filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision is in error.

John B. Piccolo

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION:

Mr. Bruce D. Varner, Attorney for Appellant (Certified Mail)
Dr. Curtis H. Springer Foundation
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
RBO

DOCKET FILE

[illegible] [illegible] Policies in [illegible] [illegible]

An employment [illegible] may not be [illegible] from [illegible] [illegible] [illegible] by reason of this application.

Res Adjudicata (State [illegible])

When an administrative officer has acted within his jurisdiction and a timely review of such action has not been sought, the doctrine of finality of administrative [illegible] is applicable to bar a claim for relief.

Date of Decision: September 1977 (December 9, 1977)

DOCKET FILES

Appeals Procedure: Failure to Appeal 1841.9

An applicant who fails to appeal from an adverse decision loses whatever rights he may have by virtue of his application.

Res Adjudicata (State Selections)

When an administrative officer has acted within his jurisdiction and a timely review of such action has not been sought, the doctrine of finality of administrative action is operative to bar a claim for relief.

State of California, Riverside 05827 (February 5, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 FEB 17 AM 10 00

In reply refer to:
704
Riverside 05827

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

February 5, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of California : School Lands
:
:

Decision Vacated
Appeal Dismissed

The State of California has appealed from a decision of the Riverside District and Land Office, dated December 16, 1964, rejecting its application, Riverside 05827, filed October 7, 1964, for lots 1, 2, 3, 4, 5, 6, 7, and 8, Sec. 36, T. 14 S., R. 1 E., S.B.M., California, under the Act of June 21, 1934 (48 Stat. 1185, 43 U.S.C. 871a). The reason for the rejection was that the State had already received its statutory grant in this township.

The records show that the State of California had previously, on March 13, 1958, filed an application, Los Angeles 0156037, under the same law and for the identical lands applied for in application Riverside 05827. By decision of October 22, 1963, the Riverside Land Office rejected application 05827 on the basis that the State had already received its statutory grant of lands in T. 14 S., R. 1 E., S.B.M. No appeal was taken from the decision of October 22, 1963, and consequently that decision became final 30 days after its receipt. The Department has many times held that an applicant who fails to appeal from an adverse decision loses whatever rights he may have by virtue of his application. John R. Moran, Frankie Azalee Johnson, A-27463 (1957); William D. Cunningham, Alice F. McGrath, A-27297 (1956); Garth L. Wilhelm et al., 62 I.D. 77 (1955); C. T. Hegwer et al., 62 I.D. 77 (1955); Edward Christman et al., 62 I.D. 127 (1955).

The State's application, was accompanied by a letter from the State Lands Commission which refers to the Land Office decision of October 22, 1963 and disputes the conclusions of law reached in that decision with respect to the lands in question.

In Union Oil Company of California et al., 71 I.D. 169 (1964), the Department held that the doctrine of res judicata, as applied in administrative decisions by the Department, is designed to achieve orderliness in the administration of the public lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked. Every reason of policy which supports the doctrine in the courts is applicable here. There must be an end to administrative litigation also. Public rights as well as private cannot be indefinitely suspended because further litigation may someday be initiated. The Union Oil Company decision pointed out that since 1833 the Department has consistently held that the doctrine of res judicata is applicable to departmental decisions.

In view of the foregoing, we have concluded that it was not proper for the Land Office to again consider in its 1964 decision the merits of an application for the same lands and under the same law that were considered in its 1963 decision. Therefore, the Land Office decision of October 7, 1964 is vacated and the State's appeal is dismissed. Accordingly, the State's request for a hearing on the issues of fact and law raised in the decision appealed from is denied.

The State of California is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosure

DISTRIBUTION:
Thomas C. Lynch, Attorney General of the State of California (Certified Mail)
The State of California, State Lands Commission
Div. of L&M, S&T (4)
Div. of L&M, PM (2)
Appeals List No. 1
MHS

DOCKET FILES

Permits: Special Land-Use 2236

An application for a special land-use permit for the purpose of drilling a well in connection with an applied for desert land entry, will be rejected where the application for the desert land entry cannot be allowed.

Charles Cotton, Riverside 05264 (March 3, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAR 15 AM 10 00

In reply refer to:
704
Riverside 05264

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

March 3, 1965

Certified Mail
Return Receipt Requested

DECISION

Charles Cotton : Special Land-Use Permit Application

Decision Affirmed

Mr. Charles Cotton has appealed from a decision of the Riverside District and Land Office, dated October 22, 1964, rejecting his above-identified special land-use permit application.

The application for the special land-use permit, which was filed in support of his petition-application for a desert land entry, Riverside 05263, was rejected for the following reasons:

1. The drilling of one well in Vidal Valley could prove nothing insofar as the groundwater situation in the whole basin is concerned.
2. Such a study could be accomplished best by public agencies such as the California Department of Water Resources and the United States Geological Survey.
3. In view of the rejection of the [applicant's] desert land application there no longer would be any requirement to drill the proposed well.

The record shows that the petition-application for a desert land entry, Riverside 05263, filed by the appellant, was denied by the Bureau's State Director for California, by decision dated December 15, 1964. The Secretary did not exercise his supervisory authority for making an administrative review of the action taken by the State Director in this matter, within the 60-day period provided for by the applicable regulation, 43 CFR 2411, and the denial of the petition and the rejection of the desert land application has become final.

Accordingly, since the desert land entry in connection with which the appellant intended to use the applied for special land-use permit cannot be allowed, there would be no purpose in granting the special land-use permit.

Therefore, the decision rejecting the special land-use permit application is affirmed.

Charles Cotton is allowed the right of appeal to the Secretary of the Interior in accordance with the regulation in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION
Mr. Charles Cotton (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
RBO

DOCKET FILES

Appeals Procedure: Dismissal 1840.0-7

Appeals will be dismissed when this is requested by the appellant.

The Pacific Telephone and Telegraph Company, Los Angeles 0111883 etc. (June 14, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 JUL 6 AM 10 00

In reply refer to:
704
Los Angeles 0111883,
0111884, 0111884-A,
0113528, 0113528-A,
0166526, 0166527,
0168775, 0170408

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 14, 1965

DECISION

The Pacific Telephone and Telegraph Company : Rights-of-way

Appeals Dismissed

The Pacific Telephone and Telegraph Company has appealed from various decisions of the Riverside District and Land Office in the above identified right-of-way cases. The appeal was directed to the Bureau's appraisal of $500 per annum as the fair market rental value of public lands in California for rights-of-way for micro-wave relay sites and access roads.

After carefully considering the data submitted on appeal, the Bureau's State Director for California made a further study and reappraisal of rental values for the use to which the lands were to be put. He determined, on the basis of such reappraisal, that the fair market rental value should be $50 per annum instead of $500 per annum as stated in the decision of the Riverside District and Land Office. The record supports this finding.

By letters of February 23 and May 5, 1965, the Bureau's Office of Appeals and Hearings informed the appellant of the reappraised rental value and asked whether it desired to submit any additional evidence. In response, the appellant advised in a letter of June 3, that in view of the reappraisal it wishes to have the appeals in the above identified cases dismissed.[1]

Accordingly, the appeals in these cases have become moot and are dismissed. The cases are being returned to the Riverside District and Land Office for further processing.

James F. Doyle
Chief, Office of Appeals
and Hearings

DISTRIBUTION
Gray, Cary, Ames & Frye, attorneys for appellant
The Pacific Telephone and Telegraph Company
OPD
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
MHS

[1] The company's appeal in Los Angeles 0170409 has not been withdrawn and will be considered in a separate decision.

In reply refer to:
704
Riverside 06628

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

July 2, 1965

DECISION

Susie Magdalene Weinheimer Lewis : Indian Allotment
: Petition-Application
:

Case Remanded

Susie Magdalene Weinheimer Lewis has appealed from a decision of the Riverside District and Land Office dated April 20, 1965. The decision rejected her petition-application for an Indian Allotment and purported to allow her a right of appeal to the Director, Bureau of Land Management in accordance with the regulations in 43 CFR Part 1840.

The reason given for the rejection was that, pursuant to a previously filed petition-application for an Indian Allotment on the same land, an initial decision classifying the land as unsuitable for Indian allotment had been issued and had become a final order of the Secretary of the Interior by virtue of 43 CFR 2411.2. The decision held, in effect, that since the land had recently been classified as unsuitable for Indian allotment, Mrs. Lewis's petition-application would not be considered.

Under Executive Order 6910, of November 26, 1934, the subject land, together with all other vacant public land in California and certain other states, was withdrawn from entry, selection and location under the non-mineral land laws. Section 7 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1272, 43 U.S.C. § 315f, authorizes the Secretary of the Interior to examine, classify and open to entry, selection or location any lands withdrawn by Executive Order 6910 if he finds that they are more suitable for some other use than that provided for in the Act. Classification under section 7 of the Act supra, is a prerequisite to approval of Indian Allotments. See 43 CFR 2410.0-3(a)(2). The procedures for classification of land pursuant to section 7 are set out in 43 CFR Subpart 2411.

The regulations governing appeals to the Director, Bureau of Land Management expressly provide that:

> "Except as otherwise provided in Subpart 2411 of this chapter, any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management other than the Director or person signing for the Director, shall have a right of appeal to the Director." 43 CFR 1842.2

Since the regulations in Subpart 2411 are applicable to Mrs. Lewis's petition-application, and since Subpart 2411 does not provide for an appeal to the Director, it was improper to allow the right of appeal in this case.

Accordingly, the case file is returned to the Riverside District and Land Office for further appropriate action under Subpart 2411. The $5 appeal filing fee paid by Mrs. Lewis should be refunded.

James F Doyle
Chief, Office of Appeals
and Hearings

DISTRIBUTION:
Susie Magdalene Weinheimer Lewis
SD (California)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
AKR

DOCKET FILES

misc

Appeals Procedure: Dismissal 1840.07

An appeal will be dismissed when the appellant relinquishes the land described in the application which is the subject of the appeal.

Daniel W. Adney, Fairbanks 020002 (July 21, 1965)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 AUG 2 AM 10 00

In reply refer to:
704
Fairbanks 020002

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

July 21, 1965

DECISION

Daniel W. Adney : Trade and Manufacturing Site

Appeal Dismissed

Daniel W. Adney has appealed from a decision of the Fairbanks Land Office, dated May 24, 1963, which rejected, in part, his application to purchase a tract of unsurveyed land for a trade and manufacturing site pursuant to section 10 of the Act of May 14, 1898, as amended (48 U.S.C. sec. 461).

On June 24, 1965, the appellant filed a relinquishment of his trade and manufacturing site application in its entirety.

Accordingly, the appeal in this case has become moot and it is dismissed.

James F. Doyle
Chief, Office of Appeals
and Hearings

DISTRIBUTION:
Daniel W. Adney
Hon. Moris K. Udall, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
MHS

appeal to Sec
affirmed as modified
A-30586 9-26-66

DOCKET FILES

Alaska: Headquarters Sites 2233.9-1

An application to purchase a headquarters site settlement claim under the provisions of the Act of March 3, 1927, is properly rejected where the claimant fails to show that he has occupied the land in the manner contemplated by the law and regulations.

Alaska: Headquarters Sites: Form and Content of Application 2233.9-1(e)

An applicant for purchase of a headquarters site settlement claim who alleges that he is himself engaged in trade, manufacture, or other productive industry has the burden of showing that he is, in fact, actively conducting a productive enterprise and that the land he seeks to purchase is its headquarters.

Lee S. Gardner, Fairbanks 033684 (January 27, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 FEB 16 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Fairbanks 033684

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 FEB 16 AM 10 00

January 27, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Lee S. Gardner : Application to Purchase
: Headquarters Site
: Settlement Claim

Decision Affirmed as Modified

Lee S. Gardner has appealed from a decision of the Fairbanks District and Land Office, dated October 19, 1965, which rejected his application to purchase the land in his headquarters site settlement claim under the Act of March 3, 1927, 44 Stat. 1364, 48 U.S.C. § 461 (1964), because a field examination of the claim revealed that the land has not been used as either a homestead or a headquarters site in the manner contemplated by the law and regulations. The decision pointed out that Mr. Gardner's application to purchase does not claim any utilization of the land for business purposes. His application states only that he is in the boat rental business and that the claim, "*will be used* for headquarters, storage and repair facilities, and limited marine ways, etc." (emphasis added)

On appeal, Mr. Gardner contends that he is using the land as a bona fide headquarters for his business. The record shows that he intends to construct improvements on the land but does not wish to do so until he at least has some binding assurance that title will be conveyed to him. He argues that the headquarters site law and regulations do not require him to construct anything on the land in order to qualify for patent.

The Act, *supra*, provides, in pertinent part, that a person "*who is himself engaged* in trade, manufacture or other productive industry may purchase one claim not exceeding five acres, of unreserved public lands . . . as a homestead or headquarters, under rules and regulations to be prescribed by the Secretary of the Interior upon payment of $2.50 per acre." (emphasis added)

The regulations which the Secretary has prescribed provide that care will be taken in all cases before patent issues to see that the land applied for is used for the purposes contemplated by the Act of March 3, 1927, and that it is not used for any purpose inconsistent therewith. 43 CFR 2233.9-1(d). The regulations also require that an application to purchase a headquarters site claim must show, among other things, the actual use and occupancy of the land involved. 43 CFR 2233.9-1(e)(2).

The above cited law and regulations are construed to mean that an applicant can be allowed to purchase his headquarters site claim only after he has shown (1) that he is engaged in a productive industry, and (2) that his claim constitutes the headquarters of that industry. The burden is upon the applicant to show that the land is being used as a bona fide headquarters site before his application to purchase can be accepted.

There is no express requirement that improvements must be constructed upon a headquarters site claim. It is reasonable to assume, however, that improvements would be necessary before the land could be used as the headquarters of a productive industry. The nature of the improvements would depend upon the requirements of the particular industry in which the claimant is engaged. In any event, it may be said that the basic improvements needed to create a headquarters for the claimant's business must be constructed and in use before an application to purchase the land in the claim can be accepted.

The Bureau's field examination of Mr. Gardner's claim revealed that he has cleared the land and that he has also placed a pile of building logs and several poles on the site. This may be regarded as evidence that Mr. Gardner has expended time and money in working on the land, but it does not indicate in what way the land is presently being used as the headquarters of a productive boat rental business. At present, the claim is little more than a point at which Mr. Gardner ties up his houseboat during the summer months. The construction and use of substantial improvements such as docks, facilities for repair and storage, or other structures related to the operation of a boat rental business, though not required by the law or regulations, would be tangible evidence of the claimant's good faith and intent to remain in business after the land has been conveyed to him.

A headquarters site claimant who applies to purchase the land in his claim under the provisions of the Act of March 3, 1927, is not required to show that he resides on the land. He is only required to prove that he is actively using the land in good faith as a headquarters for a productive business. In Alaska, due to weather conditions, a boat rental business can be operated only during the warmer months of the year. Active use of the claim as a headquarters during those months is sufficient occupancy to satisfy the regulations.

There is nothing in the record to show that Mr. Gardner's boat rental service is, in fact, a productive industry. The term "productive industry", as applied to this case, connotes a continuous chain of boat rental transactions. During their field investigation, the Bureau's examiners were able to determine only that Mr. Gardner took several people for boat rides on

July 4, 1965. This one isolated instance is clearly not sufficient proof to substantiate Mr. Gardner's contention that he is in the boat rental business. The onus is upon Mr. Gardner to show a history of business that would justify characterizing his activities as a productive industry.

In an analogous situation involving an application to purchase a trade and manufacturing site, the Department held that in order for the applicant to prove that his air strip was a productive industry it was necessary for him to show how often the strip was used by paying customers and what revenue was derived from its operation. James E. Allen, A-30085 (February 23, 1965). The Department said: "We do not mean to imply that a modest operation or even an unprofitable one would necessarily fail to qualify under the . . . law. The law does not require the existence of a full blown enterprise before patent can issue. We do not believe, however, that the law can be interpreted to encompass an operation so infrequently used by customers and so unproductive of gross receipts as the business operated by the appellant . . . ."

An application to purchase is properly rejected where the applicant fails to meet the burden of presenting sufficient evidence to prove that he has met the purchase requirements set by the law and regulations. Cf. John H. Gilbert, A-30390 (August 19, 1965). Mr. Gardner has not shown in what way the land in his headquarters site settlement claim is presently being used as a bona fide headquarters for a productive industry. If, at any time during the statutory life of his claim, Mr. Gardner can show that he has established a headquarters on the land and that he is operating a productive industry, he should file another application to purchase.

The decision appealed from states: "When this decision becomes final a refund of the $10 remitted as purchase payment will be authorized." It appears from the accounting receipts in the case record that the only money Mr. Gardner remitted with his application to purchase was a $10 filing fee. All purchase applications must be accompanied by an application service fee of $10 which is not returnable. 43 CFR 2233.9-1(e)(11). Therefore, there can be no refund of the $10 which accompanied Mr. Gardner's application.

Accordingly, the decision of the District and Land Office is affirmed as modified.

Lee S. Gardner is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Subpart 1844. See Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C., 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant will have the burden of proving by presenting positive and substantial evidence wherein this decision is in error.

James F. Doyle

Chief, Office of Appeals and Hearings

Enclosures

DISTRIBUTION:

Mr. Lee S. Gardner (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
AKR

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 FEB 16 AM 10 00

file read
3-28-66

misc

DOCKET FILES

Appeals Procedure: Dismissal 1840.0-7

Where the appellant accepts the Department's wheeling stipulations, as a condition for the grant of a transmission-line right-of-way, and the additional stipulations requested by the appellant are acceptable to the Department, the issue on appeal is rendered moot and the appeal will be dismissed.

Pacific Power and Light Company, Sacramento 075363 (March 15, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1966 MAR 28 AM 10 00 (3)

In reply refer to:
704
Sacramento 075363

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

March 15, 1966

DECISION

Pacific Power and Light Company : Right-of-Way Application (Transmission Line)

Appeal Dismissed
Case Remanded

The Pacific Power and Light Company has appealed from a letter-decision of the Sacramento Land Office, dated July 21, 1965, requiring the company to accept the wheeling stipulations contained in departmental regulation 43 CFR 2234.4-1(c)(5).

In its letter of January 28, 1966, the appellant states that it will accept the Department's wheeling stipulation, if the Department will, in turn, accept the additional stipulations set out in the appellant's letter.

There is no objection to the additional stipulations proposed by the appellant, because they are substantially in accord with those approved by the Department in Idaho Power Company, A-30294 (March 4, 1965).

Therefore, since the issue in this case is moot, the appeal is dismissed, and the case is remanded for further processing.

James F Doyle
Chief, Office of Appeals
and Hearings

DISTRIBUTION
Pacific Power and Light Company
Associate Solicitor, Water & Power (3)
Assistant Secretary, Water & Power Development (1)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
MHS

DOCKET FILES

Permits: Rental Charge 2236.3

A special land-use permit for the maintenance of an advertising display sign on public land is properly cancelled where the permittee fails to pay timely the advance annual rental required by the terms of the permit and the provisions of the regulations.

Permits: Advertising Displays 2236.6

A special land use permit for the maintenance of an advertising display sign on public land along a highway is properly cancelled where it has been determined that the sign interferes with the scenic values of the lands in the area.

Lee M. Wengler, Riverside 05575 (May 2, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAY 16 AM 10 00 (3)

UNITED STATES'
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Riverside 05575

May 2, 1966

CERTIFIED MIAL
RETURN RECEIPT REQUESTED

DECISION

Lee M. Wengler : Special Land Use Permit

Decision Affirmed

Lee M. Wengler has appealed from a decision of the Riverside District and Land Office, dated January 11, 1966, cancelling his 5-year special land-use permit which had authorized him to maintain an outdoor advertising display on public land. The stated reasons for cancelling the permit are:

> "Permits for advertising displays are not provided for by law. They are privileges extended by the Secretary of the Interior under his general authority to manage the public land. They are revocable by their own terms.
>
> "The permit in question was issued subject to certain conditions, including the following: 'The permit is revocable for any breach of the conditions hereof. It is also revocable at the discretion of the authorized officer of the Bureau of Land Management, at any time, upon notice, if in his judgment the lands should be devoted to another use.'
>
> "In 43 CFR 2236.02(b), the Secretary of the Interior has set forth his program for advertising displays. Among other things, the regulation states that Bureau of Land Management officials may establish standards 'to protect the public investment in the highway or in adjacent public lands, to preserve for the public significant scenic or other recreational values in the public land . . . .' Mr. Wengler's sign is located at a place where we feel it interferes with significant scenic values in public lands which belong to the public.
>
> "Pursuant to the President's Natural Beauty program and his May 26, 1965 Message to Congress on Highway Beautification, this office, in order to protect and provide more effectively for maintenance of the natural beauty along roads, has adopted a program of no longer authorizing additional special land-use permits at the end of the specified annual rental period.

> "The permit contains the proviso that the permittee shall pay the full amount of the annual rental in advance. Although the second years' rental was due on or before August 31, Mr. Wengler did not remit the rental until September 11."

The appellant alleges:

1. He did not receive the customary advance notice that the rental payment was due.
2. Although the Secretary may cancel the permit in order to use the land for other purposes, the real reason for cancelling his permit appears to be the President's statement to Congress on the preservation of the natural beauty of our lands.
3. The cancellation of the permit is based upon opinion; not law.

The record shows that on October 1, 1960, the appellant acquired a motel, known as the Panamint Motel, in Inyokern, California. Included in the transfer of this property to the appellant was an outdoor advertising sign, 10 feet by 6 feet, supported by 6 inch steel posts set in concrete. The sign is located on public land along U. S. Highway 395, about 29 miles south of Red Mountain, California.

In June 1964, Bureau personnel discovered that the sign in question was being maintained on the public land without permission. Trespass charges were assessed for the unauthorized use of the site for such purpose, and a settlement was effected. Thereafter, in order to legalize the use of the public land, a special land-use permit dated August 12, 1964, was issued to the appellant for a period of 5 years, effective September 1, 1964.

Pertinent provisions of the permit are:

> "1. This permit is issued for the period from September 1, 1964 to August 31, 1969, and is revocable for any breach of the conditions hereof. It is also revocable at the discretion of the authorized officer of the Bureau of Land Management, at any time, upon notice, if in his judgment the lands should be devoted to another use. The permit is subject to valid adverse claims heretofore or hereafter acquired.
>
> "2. The permittee shall pay annually, in advance, to the authorized officer as rental the sum of $12.00 dollars,

> or such other sum as may be required if an adjustment of rental is made.
>
> x x x x x
>
> "10. This permit is subject to all of the applicable provisions of the regulations (43 CFR, Part 258) [1] which are made a part hereof.
>
> x x x x x

By letter of September 9, 1965, the District and Land Office Manager informed the appellant that having failed to pay the rental for the second year, which was due on or before September 1, 1965, his permit was cancelled and he was allowed 60 days to remove the sign from the land.

The issuance of permits for advertising displays, as such, on the public lands is not provided for by law. The authority of the Secretary of the Interior in such matters is set out in 43 U.S.C. § 1201, which states:

> "The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for." (underline added).

Departmental regulations provide, in pertinent part, as follows:

> "A special land-use permit x x x will be revocable for any breach of condition thereof. It also will be revocable in the discretion of the authorized officer, at any time, upon notice, if in his judgment the lands should be devoted to another use. x x x" (43 CFR 2236.2-1)
>
> x x x x x
>
> "The annual charges /for advertising displays/ must be paid in advance for such periods as may be specified by the authorized officer. x x x" (43 CFR 2236.3-2(b)). (underline added).

---

[1] These regulations have been renumbered and part 258 is now designated as part 2236.

> "The x x x maintenance on the public lands of advertising displays, without permission, is unauthorized. x x x" (43 CFR 2236.6-2).

The requirement that the rental "must be paid in advance" is a mandatory condition for continuation of the permit. The appellant admits that he did not pay the annual rental in advance, as required by the regulation, supra. Consequently, since cancellation of the permit for failure to timely pay the annual rental was proper, it follows that the notice to remove the advertising display was correct.

As stated in the decision of the Riverside District and Land Office, the Secretary of the Interior in regulation 43 CFR 2236.0-2(b), has set forth his program for advertising displays. This regulation provides, inter alia, that Bureau of Land Management officials may establish standards "to protect the public investment in the highway or in the adjacent public lands, to preserve for the public significant scenic or other recreational values in the public land x x x."

Mr. Wengler's sign was located in a place that interferes with significant scenic values in public lands which belong to the public. He has, therefore, been asked to remove his sign.

Accordingly, the decision is affirmed.

Lee M. Wengler is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James J Doyle
Chief, Office of Appeals
and Hearings

Enclosures

DISTRIBUTION:

Lee M. Wengler (Certified Mail)
Hon. Thomas H. Kuchel, United States Senate
Hon. George Murphy, United States Senate
Hon. Harlan Hagen, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
MHS

appeal to Sec.
set aside A-30691 -2-2-68

DOCKET FILES

Special Land-Use Permits: Revocation 2236.2-3 misc

The authorized officer may, in his discretion, properly revoke a special land-use permit for the maintenance of advertising displays on a highway at any time, and particularly where he determines that the continued maintenance of such displays would be incompatible with the announced policy and program of the President of the United States for beautifying the nation's highways.

Desert Outdoor Advertising, Inc., Riverside 05112 (June 27, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 JUL 15 AM 10 00 (3)

In reply refer to:
704
Riverside 05112

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

June 27, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Desert Outdoor Advertising, Inc. : Special Land-Use Permit
:
:
Decision Affirmed

Desert Outdoor Advertising, Inc., has appealed from a decision of the District and Land Office, Riverside, California, dated April 5, 1966, cancelling its above-identified special land-use permit authorizing the maintenance of two outdoor advertising displays located on certain public lands in sec. 30, T. 3 S., R. 4 E., SBM, California. The records show that the annual rental for the permit has been paid to May 14, 1966.

The decision appealed from recites in pertinent part:

> "Pursuant to the President's Natural Beauty Program and his May 26, 1965 Message to Congress on Highway Beautification, this office is no longer authorizing Special Land-Use Permits within this District. Uniformly, this office is terminating such permits at the end of the annual rental period specified by the permit; this revocable procedure is within the terms of the permit and the applicable regulations. Therefore, in accordance with the authority under Proviso 1 on the permit (Form 4-972), and 43 CFR 2236.2-1, the permit is hereby canceled effective May 14, 1966." 1/

The appellant was allowed 60 days from the date of cancellation of the permit within which to remove its signs, and to notify the Riverside District and Land Office of the date of removal.

The appellant in its appeal contends, in substance, that (1) by the terms of the special land-use permit, it was issued for the period May 15, 1964 to May 14, 1969, and as authorized by the permit, appellant entered upon the lands in question and erected and rented outdoor bulletin advertising signs in pursuance of its business operations, and (2) it has performed all of the obligations and conditions of the permit and the rules and regulations promulgated by the Bureau of Land Management with respect thereto. The appellant requests that the Director review and rescind the decision appealed from because it is a breach of the Department's contractual obligation to the appellant, and in confict with the Congressional policy on this matter.

1/ The text of the President's message to Congress regarding Highway Beautification may be found in 5 United States Code, Congressional and Administrative News, Page 902 (June 20, 1965).

The appellant also asserts that paragraph 1 of the special land-use permit authorizes the Bureau of Land Management to revoke this permit only if the land is to be devoted to another use. The appellant also avers that to date no regulations have been issued directing that signs of the type maintained on these permits be removed. In this connection the appellant states that on January 28, 1966, pursuant to section 303 of the "Highway Beautification Act of 1965", the Department of Commerce issued a suggested draft of national standards concerning outdoor advertising, and is now holding hearings throughout the United States; however, to date, the standards have not been finalized and are of no legal authority. The appellant also claims that certain Bureau of Land Management employees have indicated that until the Bureau of Public Roads, an Agency of the Department of Commerce, has promulgated standards with respect to signs bordering upon inter-state highways, no action will be taken (by the Bureau of Land Management) with respect to existing signs.

The appellant states that the decision appealed from is in violation of the law and congressional Policy to phase out highway advertising over a period of five years, as contemplated by the Act of October 22, 1965, 79 Stat. 1028, 23 U.S.C. § 131 (1965), which provides, *inter alia*, that any sign, display or device lawfully in existence along the inter-state system or the Federal Aid Primary System on September 1, 1965, which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes non-conforming. The appellant concludes that in view of the fact that its signs were standing on September 1, 1965, the signs should not be required to be removed at least until 1970, and that there was no justification for the cancellation of the permit.

The provisions of paragraph 1 of the subject permit, and the regulation, 43 CFR 2236.2-1, as cited in the decision appealed from, authorize the appropriate officer to cancel a special land-use permit for any breach of condition thereof, or where, in his discretion, he determines that the lands involved should be devoted to some other use. However, the regulations contained in 43 CFR 2236.2-3 (formerly 258.21), govern the issuance of special land-use permits for the maintenance of advertising signs or displays on public lands, and are more applicable to the situation here under consideration than the regulations contained in 43 CFR 2236.2-1.

The regulations in 43 CFR 2236.2-3 provide in pertinent part:

> "(a) Special land-use permits to erect and maintain advertising displays on the public lands will be issued on a form approved by the Director, in his discretion, for such period as he or it may deem reasonable in the circumstances. *The permits will be revocable in the discretion of the authorized officer at any time.*" (Emphasis supplied)

It is true there is nothing of record to indicate that there has been a breach of condition of the permit in this case, or that a determination has been made that the lands involved should be devoted to some other use. However, the authorized officer has determined that the continued maintenance of the subject advertising signs would be incompatible with the announced policy and program of the President of the United States for beautifying the nation's highways. Consequently, and pursuant to the discretionary authority contained in the applicable regulations, he has revoked the appellant's special land-use permit.

Accordingly, the decision appealed from is hereby affirmed.

Desert Outdoor Advertising, Inc., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

John B. Piccolo
Acting Chief,
Office of Appeals and Hearings

Enclosures

DISTRIBUTION:
Desert Outdoor Advertising, Inc., (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
RBO

misc

DOCKET FILES

Railroad Grant Lands 2224

In the absence of proof by the railroad company that it had paid into the Treasury of the United States the cost of surveying, selecting and conveying the land in issue, pursuant to section 21 of the Act of July 2, 1864, there can be no bona fide claim by purchasers from the railroad company because those purchasers accepted the conveyance with full knowledge of the provisions of the law imputed to them.

The burden is upon the railroad company to show by clear and convincing evidence the agricultural character of land that had been returned as known or as prima facie mineral in character by the deputy surveyor, and this is true even though the company may have sold such land.

Lands which were known or denominated as prima facie mineral in character at the time of the definite location of the railroad or in the return of the public land survey are excluded from the grant of place lands to the railroad company. This is true even though the known mineral lands may lose their mineral character. The lands which are prima facie mineral in character are excluded from the grant until a determination of the character of the lands is made.

Persons having actual or constructive notice of the exception of mineral lands from the grant to the railroad company who purchase such lands within the limits of the grant, are not bona fide good faith purchasers within the meaning of Section 5 of the Act of March 3, 1887.

The final provision of the saving clause of section 32(b) of the Transportation Act of 1940 does not authorize the exception from a release of claims covering those lands for which a selection list was filed but not approved by the Secretary of the Interior.

Surveys of Public Lands: Generally 9180

The field notes of public land surveys are a part of the permanent official records of the Bureau of Land Management and as such may be resorted to wherever they have bearing in any case arising before the Bureau.

Appeals Procedures — Generally (Laches) 1840

An application for relief filed more than 15 years after the parties were informed of the defects in their claim is subject to rejection because of laches.

③

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 DEC 1 AM 10 0

Southern Pacific Company, Sacramento 079867 (November 4, 1966)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Sacramento 079867

November 4, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Southern Pacific Company : Application for Patent

Reversed in Part
Affirmed as Modified in Part

Southern Pacific Company, successor to the Central Pacific Railroad Company, has appealed from a decision of the Sacramento Land Office, dated June 9, 1966, on behalf of Bertha A. Correia, the real party in interest. The decision rejected the appellant's application for Lots 3 and 4 of the $SE\frac{1}{4}$, Sec. 27, T. 18 N., R. 11 E., MDM, Nevada County, California. Those lots are located in the Tahoe National Forest and they contain 60.97 acres.

The appellant's application was filed pursuant to the Act of July 1, 1862 (12 Stat. 489) as amended by the Act of July 2, 1864 (13 Stat. 356) and Section 321(b), Part II, Title III of the Transportation Act of 1940 (54 Stat. 954, 49 U.S.C. 65). The appellant's application was accompanied by its Selection List No. 14 for the lots described above. The Land Office decision states, in substantial part, as follows:

> "A protest against the application was filed October 14, 1965 by the Forest Service, U. S. Department of Agriculture, alleging in substance that Bertha A. Correia, the present claimant of the land, could not establish that she was the successor in interest to Isaac L. Thurber and Judson Rice, the original grantees from the Central Pacific Railroad Company; that the land is and always was mineral in character and that it was officially determined to be mineral in character pursuant to Contest No. 1437 in connection with Sacramento 014870 referred to below; and that Messrs. Thurber and Rice were not innocent purchasers for value since they had received a mineral patent on June 18, 1894 for mineral lots 59 and 60 which are immediately adjacent to lots 3 and 4 in the $E\frac{1}{2}SE\frac{1}{4}$ of said section 27, and that they knew, or reasonably should have known, that lots 3 and 4 were mineral in character. A copy of the protest was served on the applicant, but no answer thereto has been filed.
>
> The records show that the Central Pacific Railway Company, the then successor to the Central Pacific Railroad Company, filed an application for patent, List 91, for the above described land together with other land in section 27 on March 27, 1924 under the Act of July 1, 1862, supra, as amended, which was assigned serial number Sacramento 014870. The Forest Service, U. S. Department of Agriculture, filed a protest against the listing of the land, alleging the land

to be mineral in character and Contest No. 1437 was initiated. The Central Pacific Railway Company was served with a notice of contest and it filed an answer on July 15, 1924 denying the mineral character of the land. On July 2, 1929 the Company withdrew its answer. The default of the Company after due service of notice was taken as an admission of the charges, and a decision of the Acting Assistant Commissioner, General Land Office, dated October 22, 1929, so indicated, adjudged the land to be mineral in character, cancelled the list, and the case was closed.

The Acts of July 1, 1862 and July 2, 1864, supra, specifically excepted mineral lands from the operation of the grant to the railroad. In view of the General Land Office decision of October 22, 1929, referred to above, adjudging the land to be mineral in character as a result of the contest served on the railroad, the matter is res adjudicata and is not subject to reopening pursuant to an application filed under Section 321(b) of the Transportation Act of 1940. This doctrine of administrative action has been recognized and applied in appropriate cases before the Department, and is designed to achieve orderliness in the administration of public lands as well as finality of decisions."

The appellant alleges Bertha A. Correia. has filled in the missing links in her chain of title to the property. In addition, the appellant has requested that consideration be given to the evidence submitted or hold a hearing to determine whether the subject land is mineral or non-mineral in character.

The record shows that the Central Pacific Railroad Company had purportedly sold Lots 3 and 4, and other lands located in the same quarter-section, to Thurber and Rice on September 28, 1892. These lands were withdrawn for inclusion into the Tahoe National Forest by an Executive Order dated July 2, 1908. The Government's first notice of a claim to the land occurred on March 27, 1924, when the Central Pacific Railroad Company filed its Selection List 91. In the contest action by the United States Forest Service against the railroad company commenced in 1924, personal service upon the purported successor-in-interest to Thurber and Rice was made on December 3, 1927, by serving Lilly Thurber as agent for Mary E. Shaser. No answer was filed by or for Mary E. Shaser or **anyone else** as the successor in interest to Thurber and Rice and the railroad company thereafter withdrew the answer it had filed, which denied that the lands were mineral in character, whereupon a decision was issued on October 22, 1929, cancelling selection list 91 and adjudging the lands as mineral in character. This determination was made after the Forest Service made a prima facie case showing the land is valuable for gold. There was no further activity in this Bureau as to these lots until February 17, 1950, when the appellant, acting as agent for Bertha A. Correia, addressed an inquiry to the Director. There was a lapse of more than 15 years from the date of the 1950 letter to the filing of the 1965 application.

Several decisive issues of fact and of law, in addition to those raised by the parties in interest, must be considered before a proper judgment can be made in this case.

Nothing in the records of either case, Sacramento 014870 or 079867, shows that the required survey fees have ever been paid by the railroad company, as required by section 21 of the 1864 Act. This section provides:

> "And be it further enacted, that before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the cost of surveying, selecting and conveying the same, by the said company or party in interest, as the titles shall be required by said company, x x x"

See also 43 U.S.C. 881 whose provisions contain the general law on the same subject and are essentially to the same effect as sec. 21 of the 1864 Act.

The United States Supreme Court in Deseret Salt Company v. Tarpey, 142 U.S. 241 (1891) ruled in favor of the Government's grant to the Central Pacific Railroad Company and the company's conveyance to D. P. Tarpey because, among other things, the lands having been surveyed in 1871, the company at the time of making its selection, had paid the costs of selecting, surveying, and conveying the legal subdivision described by that survey. See also New Orleans Pacific Railway Company v. United States, 124 U.S. 124 (1888) where the court held that in the absence of paying the costs of surveying, selecting, and conveying the same by the said company or persons in interest, neither the petitioner nor its grantor had acquired any right to claim the lands granted, the petitioner having accepted the conveyance with full knowledge of the provisions of the Act. The Court also ruled that the payment is a condition precedent to the right to receive the title from the Government and until this payment is made, the equitable title to the land by the company is incomplete. See also United States v. Central Pacific Railway Company, 52 L.D. 81 (1927) and St. Paul Minneapolis and Manitoba Ry. Co. 20 L.D. 22 (1895). In this case, payment of the survey fees would not benefit the appellant or Mrs. Correia, for the reasons appearing below.

The parties in interest seem to have given no consideration to the information appearing on the face of the official plat of survey of the lands in T. 18 N., R. 11 E., MDM approved on February 16, 1874, or in the field notes of the deputy surveyor which were commenced on June 4 and completed on June 18, 1873, more than 18 years before the Central Pacific Railroad Company sold the lands to Thurber and Rice in 1892. The official plat of survey contains the following printed words which are boldly inscribed across the middle of the plat:

"MINERAL LAND MOUNTAINOUS WELL TIMBERED"

The deputy surveyor's field notes contain the following:

> "General Description
> "This township is of a very mountainous character.
> "It is well covered with a fine quality of Sugar Pine Fir and Cedar. There are several quartz mills in operation of which the Erie Mine in Sec. 21 is the most important. Eureka South is a small mining town situated in Sec. 9 it contains about 75 houses and 150 inhabitants. South Fork, an old mining village in Sec. 15, is now deserted. There has been and is at present a great amount of placer mining through out this Township and I therefore return it as entirely mineral character."

A survey note after the descriptions of secs. 27 and 28 states:

> "Considerable mining for gold has been done in the E part of secs. 27"

The 1864 Act, also provides in sec. 4 thereof that:

> "x x x any lands granted by this Act, or the Act to which this is an amendment, shall not x x x include any x x x mineral lands, x x x or any lands returned or denominated as mineral lands x x x"

Thus, known mineral lands and lands denominated as prima facie mineral in character were, under the law, excluded from the grant to the railroad and this, the Central Pacific Railroad Company knew as early as August 30, 1890, when the Department rendered its decision in Central Pacific R.R. Co. et al., v. Valentine, 11 L.D. 238, 240, 241, 242, 243, 245, 246 (1890). The Central Pacific Company also received notice as early as June 6, 1891, that until patent issues, all mineral lands were excluded from the grant and that the Department has the authority to determine the character of the land claimed by the railroad company under the grant, even though the company may have sold such lands. North Star Mining Co. v. Central Pacific R.R. Co., 12 L.D. 608, 609 (1891).

In addition, the Department had ruled in 1883 that lands returned as saline or mineral by the surveyor-general were not available for entry until the prima facie character of the lands is finally determined. Cole v. Markley, 2 L.D. 847, 848, 849, 850, 851 (1883). Finally, as early as November 25, 1891, the Central Pacific Railroad Company was told that where land is returned as mineral by the surveyor-general, the burden of proof was upon the company to show the agricultural character of the land. Central Pacific R.R. Co., 13 L.D. 603, 606 (1891). Moreover, this proof by the railroad company must be by clear and convincing evidence. Central Pacific Ry. Co. 43 L.D. 545, 546, 547 (1914). See also Central Pacific Ry. Co., 45 L.D. 25, 26, 27 (1916). In the face of this evidence appearing on the official public records of the then General Land Office and the several decisions of the Department involving the Central Pacific Railroad Company prior to September 28, 1892, the date of the sale to Thurber and Rice, nothing has ever been submitted by way of probative evidence disputing the determination of the deputy-surveyor as to the mineralized character of the land sought.

Consequently, the landslocated in the SE$\frac{1}{4}$ of Sec. 27, T. 18 N., R. 11 E., MDM were deemed to be prima facie mineral lands and the railroad company has never acquired a disposable interest in these lots. This may explain why the Central Pacific Railroad Company had not, if in fact they had not, paid the survey and other fees for the land in the odd numbered sections in T. 18 N., R. 11 E., MDM.

The next issue is whether Thurber and Rice may be considered bona fide purchasers under Section 5 of the Act of March 3, 1887 (24 Stat. 556).

Bureau records show that Thurber and Rice became, after several mesne conveyances, the successors in interest to two quartz mining claims which were located in 1882 and a third claim which was located in 1884. This came about on January 22, 1887, when Thurber and Rice took mortgages on those mining claims and then foreclosed on those mortgages and thereafter received a Sheriff's deed to the claims on March 25, 1892. These mining claims were surveyed by a mineral surveyor under instructions dated September 1, 1892 and they were thereafter identified as Lots 58, 59, and 60, T. 18 N., R. 11 E., M.D.M. covering 52.16 acres. An application for mineral patent, M.E. 1565, was filed by Isaac L. Thurber's Attorney in Fact on October 24, 1893, and a Register's Final Certificate of entry was issued on February 12, 1894, on what was identified as the Baltic Consolidated Quartz Mine, and patent No. 24451 was issued on June 18, 1894. A diagram prepared by the U. S. Surveyor General's Office, San Francisco, California, dated February 17, 1893, shows that a substantial portion of the north-half of mineral Lot 59 extends into the south-east portion of what would otherwise be a part of the applied for Lot 4, and nearly all of Mineral Lot 60 extends into what might otherwise have been located in the north-east quarter of Lot 4 and the south-east quarter of Lot 3, the two lots now claimed by Mrs. Correia.

At or about the time that Thurber and Rice were giving their mineral surveyor information about their mining claims, namely September 1, 1892, with a view toward applying for a mineral patent to those lands, they entered into a contract with the Central Pacific Railroad Company on August 22, 1892, to purchase all of the E$\frac{1}{2}$SE$\frac{1}{4}$, Sec. 27, T. 18 N., R. 11 E. MDM, containing 80 acres, for $400 in gold coin. The instrument of title, executed on September 28, 1892, upon which Mrs. Correia relies, recites that it is based upon an "Indenture of Mortgage or Deed of Trust of 1st October 1870."

This instrument which is described as a "deed" is from the Central Pacific Railroad Company and the Metropoliton Trust Company of the City of New York and it states that the entire purchase price had been paid to the trust company, whereupon, the railroad and the trust companies

> "x x x do assign, transfer and set over to the said Isaac L. Thurber and Judson Rice and their heirs and assigns, all right, title and interest that the said companies now have *or may hereafter acquire* from the Government of the United States x x x The East half of the South East Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section Twenty seven (27), in Township Eighteen (18) North of Range Eleven (11) East, Mount Diablo Base and Meridian, containing Eighty (80) acres, according to the United States surveys, x x x" (the first underline is added)

This language in the deed is preceded by another statement in the deed that:

> "x x x the said Central Pacific Railroad Company has contracted for the sale of all right, title and interest that it now has *and may hereafter acquire* from the Government of the United States x x x to Isaac L. Thurber and Judson Rice x x x " (underline added).

Nothing in the case file, such as a letter of confirmation, a timely selection list, or any other information shows that Thurber and Rice had any reasonable basis for believing that the 80-acre tract which they had paid for in gold had been or was in the process of being granted to the railroad company by the United States Government. Nor is there any explanation as to why Thurber and Rice as *bona fide* purchasers were willing to pay the railroad company for 19.03 acres of land embraced within that 80-acre tract, when they already had a sheriff's deed for that land and had already taken steps to secure from the Government a mineral patent for that and for other adjoining lands. This unexplained action is made even more incomprehensible when it is considered in light of Section 4 of the granting act, which expressly excludes from the grant "any lands returned or denominated as mineral lands." See also *Northern Pacific Ry. Co.*, 46 L.D. 4 (1916) where the Department ruled that a surveyor's report "there are many indications of the presence of mineral, gold, copper, and silver, though no veins have been located," the land, not being of the class named is not subject to selection under that act, even though it be in fact nonmineral.

The Supreme Court held, in *Cragin* v. *Powell*, 128 U.S. 691 (1888) that when the General Land Office made and approved a governmental survey of public lands, the plats, maps, field notes and certificates having been filed in the proper office, they became as much a part of the grant as if such descriptime features were written out on the face of the grant. The Department has ruled that the field notes of survey are a part of the permanent official records of the General Land Office, and as such, may be resorted to upon any question whereon they have bearing, arising in any case before the Land Department (now the Bureau of Land Management). *Mason* v. *Cromwell*, (on Review), 26 L.D. 369 (1898).

The Department has ruled in *Hutton et al.* v. *Forbes*, 31 L.D. 325 (1902) that where a person had purchased land from the Railroad on May 16, 1892, and the lands were surveyed in 1880 and the surveyor-general's return described certain of the purchased lands as containing "deposits of petroleum in considerable quantities" and the surface indications of the lands showed they had an actual or known mineral character and the purchaser had knowledge of the character of the land, that purchase was not made in good faith. See also *United States* v. *Southern Pacific Co.*, 251 U.S. 1 (1919). Moreover, this rule applies whether the purchaser had actual or *constructive* notice that the lands were mineral in character. *United States* v. *Central Pacific R. Co. et al.*, 84 F. 218 (1898). Another Federal Court ruled, citing *Barden* v. *Northern Pacific Railroad* 154 U.S. 288 (1894), that no title to any mineral lands, whether known or unknown as mineral, passes until a patent shall issue; that it is the duty of the land department to investigate the facts and to withhold patent to all lands it shall conclude are mineral. The conclusive effect of this *Barden* decision, stated the Court, is that the complainants have now no title to any of these lands; they have no actual control over or use of any; they cannot sell or give title to any; and whatever right or claim they may have is now so fully suspended that they cannot allege any present title. *Oakes* v. *Myers, Jefferson County Treasurer*, 68 F. 807 (1895). Furthermore, in the interest of fully exploring the probabilities in this case on appeal, even if Thurber and Rice could be deemed *bona fide* purchasers under section 5 of the 1887 Act, *supra*, they were required by that act

> "x x x to make payment to the United States for
> said lands at the ordinary Government price of
> like lands x x x"

This payment to the Government was never offered or made. Consequently, the 1887 Act would not apply to Mrs. Correia for this reason alone.

Moreover, since Thurber and Rice were on notice, when they paid for the 80 acre tract, that the "Right, title, and interest x x x may /be/ hereafter acquire/d/" by the railroad, there is a question whether, in the absence of supporting evidence, they had purchased anything more than an expectancy. The contract with the railroad and the trust companies was, under such circumstances, merely an executory agreement and the remedy, if any, by the real party in interest is against the contract sellers and not the Government.

See Atlantic and Pacific Railroad Company, Santa Fe Pacific Railroad Company, and Greene Cattle Company, Inc., 58 I.D. 577, 588 (1944) where it was stated that the company's previous attempt to convey the land for which it now seeks a patent is immaterial since it had no title to the land and could convey none. At most the company effected a promise to sell or an assignment of the benefits to accrue from the exercise of its selection right.

The next issue is whether Mrs. Correia is entitled to claim any benefits under the Transportation Act of 1940. The case file contains a letter from the appellant, dated September 10, 1965, which states, in pertinent part, that:

> " x x x x x
>
> This selection list covers unpatented land which was conveyed in 1892 and, therefore, not covered by the relinquishment to the United States of the unpatented unsold lands filed pursuant to Sec. 321 of the Transportation Act of 1940.
>
> x x x x x "

The Department has ruled in Santa Fe Pacific Railroad Company, 58 I.D. 601, 605 (1944) that the release by the railroad to the United States Government excepts only lands sold to an innocent purchaser for value prior to September 18, 1940, lands patented or certified to the company or any predecessor in interest and "lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940." The appellant's claim does not fit any of these categories. On the contrary, the Central Pacific Railroad Company did not file a selection list for this land until 1924 and this list was cancelled with the consent of the Company, when it voluntarily withdrew its answer to the contest action that had been initiated by the United States Forest Service. Furthermore, if that is not sufficient to preclude favorable action under the 1940 Act, it is noted in this case that no lists of land said to have been sold to innocent purchasers for value were filed by this appellant pursuant to sec. 321(b) of the Act. See Departmental decision Southern Pacific Company, 71 I.D. 224, 225, 226 (1964). On the contrary, the appellant's September 10 letter admits that the subject lots were not specifically excepted lands, as required. Thus, in the absence of documentary evidence showing compliance with the statutory requirements of the 1940 Act, the Southern Pacific Company cannot receive the benefits of that law. Besides, even if such a list were submitted by the appellant, it could not serve to improve Mrs. Correia's claim because those lots were declared to be mineral in character in 1929 and the grant, if any, was invalidated when the company failed to contest the charges by the Forest Service, as the company did not receive title to mineral land under the grant. The departmental decision in 71 I.D. supra, is distinguishable from this case insofar as it relies upon the rule in Clogston v. Palmer, supra. [1]

The last issue is whether the General Land Office decision of October 22, 1929, adjudging the lands described therein as mineral in character constitutes a bar to any further consideration of the mineral character of Lots 3 and 4 under the doctrine of finality of administrative action or res adjudicata.

Documentary evidence in the case record shows that in the contest action by the United States Forest Service against the Central Pacific Railroad Company's selection List No. 91, the personal service which was purportedly made on Mary E. Shaser on December 6, 1927, as the successor in interest to Thurber and Rice, was actually made on a dead person, Mary E. Shaser having died before July 18, 1911. The decree of final distribution of Mary E. Shaser's estate shows that Frank B. Jameson, Martha Shaser, and Edward A. Shaser had each, among other lands, received an undivided 1/3 interest in the E$\frac{1}{2}$SE$\frac{1}{4}$ of Sec. 27, T. 18 N., R. 11 E., MDM containing 80 acres. Martha Shaser died in 1920 and her undivided interest went to her father George A. Shaser. Edward A. Shaser died in 1924 and his undivided 1/3 interest also went to George A. Shaser, who in turn, died intestate in 1927. The final decree of distribution in the estate of George A. Shaser, which is dated March 14, 1927, shows that his undivided 2/3 interest went to Frank B. Jameson. Thus, since Frank B. Jameson was on March 14, 1927, the successor in interest to all of the 80 acres located in the E$\frac{1}{2}$SE$\frac{1}{4}$, supra, the only proper person who could have been personally served with notice thereafter in a contest action was Frank B. Jameson. [2] The record also shows that Frank B. Jameson had died in 1933 and his estate went to his daughter Bettybelle Jameson, now Bettybelle Peterson. Bettybelle Peterson granted her entire interest in the estate to Bertha Correia, the appointed administratrix of Frank B. Jameson's estate. Local taxes on the subject land had not been paid for the years 1930 to 1936, whereupon the land was advertised to be sold for taxes on June 4, 1941. However, on June 3, 1941, Bertha Correia, in her capacity of "redemptioner" paid the back taxes on June 3, 1941. Thus, the apparent equitable claim to this tract of land in the estate of Frank B. Jameson, although not expressly identified in the final decree of distribution, was nevertheless subsisting in 1945, when the court made the final distribution of the estate to Bertha Correia. Consequently, the purported personal service on Mary Shaser or her agent in 1927 was of no legal effect and the decision of October 22, 1929, was not res adjudicata as to Bertha Correia.

---

[1] This departmental discussion of the rule in Clogston v. Palmer, 32 L.D. 77 (1903) is not applicable to the instant case because the lands in the Clogston case, deal with lands which were returned as non-mineral in the public land survey prior to purchase, whereas, the public survey of the land in this case prior to purchase shows that the whole township was returned "as entirely mineral [in] character."

[2] No service by publication was attempted.

However, case file Sacramento 014870 contains a letter from L. Frandsen, Land Commissioner, Southern Pacific Company dated February 17, 1950 which was written at the request of Bertha Correia to the Director Bureau of Land Management. This letter shows at the conclusion thereof, on page 2, that a copy was sent to Bertha A. Correia, Route 2, Box 3227, Aptos, California.

This letter states, in pertinent part, that on

> "
>
> x x x x x
>
> " March 27, 1924, Central Pacific Railway Company filed its Selection List No. 91 with the United States Land Office at Sacramento, California, which list was certified by the Register and Receiver on March 27, 1924.
>
> " June 24, 1924, the Forest Service filed mineral protest charging that the above described land was mineral in character. Owners of the land at that time were notified that hearing was to be conducted, however, no action was taken by them and in view of this, on July 2, 1929, Central Pacific Railway Company filed a withdrawal of answer stating that it had no interest in its own behalf, that the answer had been filed only to enable its successors in interest to defend and that the successors in interest had not replied to the correspondence in regard to the matter.
>
> " According to General Land Office Commissioner's letter "F" of October 22 1929, the land was held to be mineral in character and the list cancelled as to the land affected and Contest Proceedings closed.
>
> x x x x x
>
> " We have now been requested by the present owner of Lots 3 and 4 of said Section 27 to ascertain whether or not there are any objections to Central Pacific Railway Company resubmitting application for patent covering the above described land. Present owner advises there is no mining being done on said land at the present time nor has there been any mining activity thereon for thirty-three years past.

> Please advise if there are any reasons why Central Pacific Railway Company cannot resubmit its application for patent on the last described land in accordance with Circular No. 1500 under Subsection (b) of Section 321, Part II, Title III of the Transportation Act of 1940 approved September 18, 1940 (54 Stat. 954)." (Underlines added)

The Associate Director, Bureau of Land Management, replied to Mr. Frandsen in a letter dated April 19, 1950. The letter stated, among other things that:

> " x x x x x
>
> The land is in the Tahoe National Forest. The Forest Service on June 24, 1924, initiated Contest No. 1437 against the list alleging that the land was "mineral in character", later amended to add "containing deposits of gold."
>
> The Company filed answer denying the mineral character of the land. It later withdrew the answer. The default of the Company after due service of notice considered to be an admission of the charge and by decision dated October 22, 1929, the truth of the charge was taken as confessed, the land adjudged to be mineral in character, the list finally canceled and the case closed. Lands within National Forests - Practice - Joint Regulations, Circular No. 435, 44 L.D. 360, 361. Government contests 43 CFR 222.5.
>
> x x x x x
>
> The provisions of Section 321b, protecting innocent purchasers of unpatented railroad lands for value prior to September 18, 1940, claims to which were released by the railroads under Section 321b have no application to lands, the right to title to which did not pass to the grantee because of their mineral character or other reason."

Mrs. Correia took no further action on this matter from 1950 until September 13, 1965, when the appellant filed the application for patent which was for her benefit.

The Department in State of New Mexico, Robert M. Wilson, Lessee v. Robert S. Shelton and John T. Williams, 54 I.D. 112, 120, 121 (1932) quoted with approval the following language from Leutholz v. Hotchkiss (259 Pac. 1117):

> " x x x Appellant did not avail himself of his right of appeal to the Secretary of the Interior from the Commissioner's ruling. The State's selection was cancelled, and both the State and Clarrage acquiesced in such cancellation. True, the right once having vested, it could not be lost merely by the subsequent discovery of the lands being mineral in character, but the right could be, and was, we think, lost by permitting the Government's cancellation of the selection duly made according to its rules and regulations to stand for the time it did. x x x Such delay as is shown here, must, we think, be treated as abandonment of his claim. The appellant slept on his rights, as was said by the Court below:
>
> " 'A party defeated by the decision of the Land Department may not wait many years after an adverse decision there, especially of an intermediate department, x x x' "

In another departmental decision, M. D. Waldron, A-28703 (January 31, 1962) the appellant was informed that:

> "x x x She is not entitled to acquiesce in an erroneous decision for a period of 5 years and then assert that she is entitled to relief from its consequences."

In this case, more than 15 years had passed from the time the Southern Pacific Company inquired about Mrs. Correias' rights to Lots 3 and 4, to the time an application for such lots was filed. Clearly, this was an unreasonable delay in the assertion of Mrs. Correias' rights. Therefore, the appellant's request to hold a hearing for the purpose of determining whether the subject lots are mineral or non-mineral in character comes much too late and it is denied.

Accordingly, the appellant's application was properly rejected.for the reasons stated above.

Southern Pacific Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

In the event of an appeal by the Southern Pacific Company, the adverse party to be served is:

Regional Attorney
Office of the General Counsel
United States Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

John B. Piccolo
Acting Chief, Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:

Bertha A. Correia (Certified Mail)
Southern Pacific Company (Certified Mail)
Regional Attorney, Office of the General Counsel, United States Department of Agriculture, San Francisco, California (Certified Mail)
Forest Service, United States Department of Agriculture, Division of Watershed Management (12)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
MHS

DOCKET FILES

misc

Appeals Procedure: Generally 1840

Where it is requested in behalf of the State Director that a case be remanded because the appellants have indicated they are prepared to negotiate their differences, the case will be remanded for appropriate action.

State of California, Jerry W. and Howard P. Blair, Riverside 02352 (January 19, 1967)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Riverside 02352

January 19, 1967

DECISION

State of California, : Recreation and Public Purposes
Applicant :

Jerry W. and Howard P. Blair, : Grazing Lease
Lessees :

Case Remanded

The State of California, Department of Parks and Recreation, Division of Beaches and Parks, the applicant for certain described public lands under the Recreation and Public Purposes Act, and Jerry W. and Howard P. Blair, lessees under Section 15 of the Taylor Grazing Act, have taken separate appeals from a decision of the Riverside District and Land Office, dated December 6, 1966. The decision allowed the State's application in part, suspended it in part, and rejected it in part. The decision also dismissed the Blairs' protest and held their grazing lease for cancellation in part.

The Manager, Riverside District and Land Office, in a memorandum dated January 11, 1967, has requested that the case be remanded for further consideration for the reason that the appellants have indicated that they are prepared to negotiate their differences in this matter.

Accordingly, the case is remanded for appropriate action.

Newton Frishberg
Chief, Office of Appeals and Hearings

DISTRIBUTION:

State of California, Department of Parks and Recreation
Jerry W. and Howard P. Blair
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
MHS

appeal to Sec
Dismissed A-30781
6-15-67

Appeals Procedure: Generally 1840

Where after the filing of an application to select lands under the Valentine Scrip Act the applicants elect to receive cash payment for some of the scrip certificates offered for the selected lands, the receipt of such cash payments for the certificates in effect constitutes a withdrawal of the application; hence, an appeal involving such application is thus rendered moot and will be dismissed.

Marblehead Land Company et al., Riverside 07784 (January 20, 1967)

DOCKET FILES

③

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 FEB 10 AM 10 00

In reply refer to:
704
Riverside 07784

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

BUR. OF LAND MANAGEMENT
1967 FEB 10 AM 10 00

January 20, 1967

DECISION

Marblehead Land Company :
Estate of Rhoda R. Adamson :
Samuel K. Rindge : Valentine Scrip Selection Petition-Application
Estate of Frederick H. Rindge :
George Rodda, Jr. :

Appeal Dismissed

Mr. George Rodda, Jr., on behalf of himself and the above-identified petitioner-applicants, has appealed from a decision of the Riverside District and Land Office, dated July 27, 1966, rejecting the above-identified petition-application, filed under the Valentine Scrip Act of April 5, 1872, 17 Stat. 649, for the reason that the lands selected are not unoccupied and unappropriated public lands of the United States within the purview of said act.

Record information shows that the applicants offered three Valentine Scrip Certificates designated as E-322 Subdivision 1, E-324 Subdivision 1, and E-324 Subdivision 2, covering approximately 40 acres each, for which they selected approximately 125 acres of land. Subsequent to the filing of their application and the appeal in this matter, the applicants applied for cash payments for two of the certificates, E-324 Subdivision 1 and 2. Cash payment was made to the applicants for these two certificates as identified by the Bureau's Eastern States Office file numbers 1794 and 1917, said payment being made in accordance with the provisions of the Act of August 31, 1964, 78 Stat. 751, 43 U.S.C. § 274 (1964), and the regulations thereunder, 43 CFR 2221.

Receipt of the cash payment for the two certificates, in effect, constitutes a withdrawal of the appellants' application in its entirety since these two certificates covered approximately 80 acres, the larger portion of the total acreage of the selected land. The appeal of the applicants is thus rendered moot insofar as the subject application is concerned. Nevada Fish and Game Commission, A-29658 (May 19, 1965).

Accordingly, the appeal is dismissed.

This decision is without prejudice to the right of the applicants to either reapply for unoccupied or unappropriated public land or cash payment with respect to the remaining original scrip certificate, as provided for by the applicable law and regulations. When and if application is made the original scrip certificate with necessary proofs of ownership must be submitted with the application.

Newton Frishberg

Chief, Office of Appeals
and Hearings

DISTRIBUTION:

Mr. Merritt H. Adamson, President, Marblehead Land Company
Estate of Rhoda R. Adamson
Mr. Samuel K. Rindge
Estate of Frederick H. Rindge
Mr. George Rodda, Jr.
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
RBO

DOCKET FILES

Appeals Procedure: Generally 1840

A case on appeal to the Director, Bureau of Land Management, will be remanded where the Bureau's State Director requests it, in light of additional information submitted by the appellant.

Donald R. Jarrett, Fairbanks 026529 (March 13, 1967)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 APR 11 PM 2 51
③

In reply refer to:
704
Fairbanks 026329

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

March 13, 1967

DECISION

Donald R. Jarrett : Trade and Manufacturing Site
:

Case Remanded

Donald R. Jarrett has appealed from that part of a decision of the Fairbanks District and Land Office, dated September 27, 1966, which rejected his application to purchase certain described lands under the trade and manufacturing site law, for the reason that a field examination revealed no improvements had been constructed on those lands by the appellant.

The memorandum of transmittal to the Director in the case record which is dated November 16, 1966 contains a request that the case be remanded for further consideration, in view of the information submitted by the appellant.

Accordingly, the case is remanded for further consideration.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

DISTRIBUTION:
Donald R. Jarrett
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
MHS

DOCKET FILES

Special Use Permits: Generally 2236

A special land-use permit will not be issued in any case when the provisions of the existing public land laws may be invoked.

Charles Kaskela and Elbert L. Clark, Riverside 184 (April 26, 1967)

In reply refer to:
704
Riverside 184

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

April 26, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Charles Kaskela and Elbert L. Clark	: :	Special Land-Use Permit

Decision Affirmed

Charles Kaskela and Elbert L. Clark, a partnership, has appealed from a letter-decision of the Bakersfield, California District Manager, dated November 1, 1966, rejecting their application for a special land-use permit for approximately 920 acres of certain described public lands to be operated by them as a "Sportsman's hunting club, to raise Rainbow trout and recreation area." The stated reasons for rejecting the application is as follows:

> "1. The lands are within the Ridgecrest Planning Unit #8 which is predominantly land in public ownership and designated for multiple use management. These lands are also within a common use area for livestock grazing under Section 3 of the Taylor Grazing Act. Many of the waters and trails in this area were constructed and/or maintained by the Bureau of Land Management for wildlife, grazing and movement of livestock.
>
> The type of use which you propose is for a single purpose to benefit specific individuals or groups of people and will conflict with multiple use management of the area.
>
> 2. In addition, the proposed construction and development is of a permanent type with a heavy capital investment.
>
> It has been the policy of the Bureau not to authorize construction of permanent type improvements or authorize uses which will cause substantial change in character.
>
> 3. The land is not physically suited for the proposed project.
>
> The high diurnal temperatures of the area make it difficult to maintain proper water temperatures for rainbow trout. The coarse, sandy soil makes the construction of rearing ponds nearly impossible and large amounts of fresh, cold, high quality water is required but not available.
>
> 4. The spring on the section line in the westerly portion between Sections 30 and 31 is a public water reserve under

> Executive Order of April 17, 1926 under Section 10 of the Act of December 29, 1916.
>
> The present supply of 5 gallons per day is not enough to support the type of operation which you propose nor without detriment to existing uses.
>
> No permission will be granted under any circumstances to develop any water in this area which is proposed for a single, isolated use and not for multiple use management.
>
> 5. The records of the Kern County Recorder shows numerous active mining claims on these lands and there is a petition-application before the BLM in Section 32 under the Mining Claims Occupancy Act of 10/23/62.
>
> You propose to use "abandoned" mine shafts, drifts and tunnels and "other mines within the area". The BLM is without authority to grant such use within the limits of a mining claim, even if "abandoned".
>
> The abandonment of a mining claim does not work in favor of the United States. A claimant maintains his possessory right by doing his annual assessment work. If he fails to do the assessment work required by law, he subjects his claim to possible relocation by another but not to seizure by the United States. A claimant may leave his claim idle for years but he has the right to return and if he does so and resumes his assessment work before an intervening location is made, then he maintains his possessory rights.
>
> The only action which can be brought by the BLM is by due process of law to bring adverse proceedings to determine validity through contest action. The expense of bringing contest would not be justified for the use intended."

The appellants allege in relevant part, as follows:

> 1. Their proposed use is consistent with multiple land use in that there will be no problem with bona fide ranchers and their rental payments will supplement the income from multiple use.
>
> 2. Their construction and development will be "a capital investment."
>
> 3. They have located vast amounts of ground water and the local temperature is no problem.

> 4. ". . . We shall only restrict hunting upon this land and maintain a select acceptable hunter, stock and land area ratio. The hunting club intended and other operations, other than raising trout, are secondary, seasonal and not prime interests at this time. Raising trout for food, game fish and stocking is the prime operation."

Applicable departmental regulations provide that:

> 1. ". . . Permits for . . . special use will not be issued, . . . in any case where the provisions of the existing public land laws may be invoked. For example, they will not be issued to authorize the use of the public lands for home, cabin, camp, health, convalescent, recreational, or business sites for which leases may be issued under the act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a), ..." (43 CFR 2236.0-2(a)(1))
>
> 2. "A special land-use permit will not be issued for more than 5 acres, except upon a showing of special need, satisfactory to the authorized officer. . . ." (43 CFR 2236.0-7(a))
>
> 3. "A special land-use permit . . . will be revocable in the discretion of the authorized officer, at any time, upon notice, if in his judgment the lands should be devoted to another use. . . ." (43 CFR 2236.2-1)

The appellants' application states that they intended to construct the following improvements on the land:

> ". . . pump water station, fish feed shed, a livable camp or house, quick freeze refer' unit, tool shed and repair bldg., plant trees, grass and natural wild bird ground cover, . . ."

They also state that the estimated cost of the proposed improvements would be:

> "$4 to $6 thousand the 1st year and each year for 5."

It is clearly evident from the information in the appellants' application that the nature of the contemplated improvements to be constructed upon the desired lands are not authorized by the regulations, supra. Consequently, it would have been appropriate, from the information on the face of the application, for the District Office to refuse to accept it.

Nevertheless, this Bureau has consistently rejected applications for special land-use permits for cabin sites. See Patrick v. McMahon, Oregon 013213

(November 29, 1963) approved by the Assistant Secretary of the Interior on December 9, 1963; W. R. Wilson, Oregon 015262 (September 29, 1964). Moreover, in a similar situation, where a special land-use permittee had appealed from a decision of the Riverside Land Office granting him a renewed permit for one year instead of the 5 years he requested and the land use involved a 30-acre tract upon which he had facilities for the breeding and raising of tropical fish and aquatic plants, this Bureau revoked the permit on appeal in its entirity and ruled that:

> "Mr. Sargent's continued use of the lands for private residence and for the maintenance and operation of a business obviously not temporary in nature is not in accordance with the prohibitions which have been placed upon the issuance of special land use permits. . . ."

In that same decision, Delbert J. Sargent, Los Angeles 0115582 (April 8, 1964) approved by the Assistant Secretary of the Interior April 22, 1964, it was also stated:

> "Where the interest of the general public requires the use of its public land, that interest must be deemed paramount to that of any special land use permittee."

In these circumstances, the Government will not allow any individual or group of individuals to appropriate public land in a manner whereby such permittee would be authorized to determine who is a "select acceptable hunter."

Accordingly, the appellants' application was properly rejected and the District Manager's decision is affirmed.

Charles Kaskela and Elbert L. Clark are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 5

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Charles Kaskela and Elbert L. Clark (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
MHS

DOCKET FILES

misc

Alaska: Headquarters Sites 2233.9-1

A headquarters settlement claim under the Act of March 3, 1927, is properly rejected where the land involved is embraced in a prior filed State selection application.

Larry W. Clark, Fairbanks 20 (May 12, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 18 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Fairbanks - 20

May 12, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Larry W. Clark : Headquarters Settlement Claim
:
:
Decision Affirmed

Larry W. Clark has appealed 1/ from a decision of the Fairbanks District and Land Office dated August 1, 1966, rejecting for recordation his notice of location of a headquarters settlement claim pursuant to section 10 of the Act of May 14, 1898, as amended by the Act of March 3, 1927, 44 Stat. 1364, as amended, 48 U.S.C. § 461 (1964). In the notice of location the date of occupancy was shown as July 18, 1966. The basis of the rejection was that the land involved is embraced in State selection application, Fairbanks 034875, filed October 28, 1965.

Mr. Clark does not dispute the propriety of the decision appealed from but explains that he needs the land as a base from which to fly his float plane in transporting supplies and clients to his home and hunting lodge.

Under the provisions of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339-343, the State of Alaska is entitled to select certain public lands in Alaska. When an application is filed by the State and accepted by the land office, all of the lands included therein are segregated from all subsequent appropriations based upon application or settlement and location, including the mining laws. See 43 CFR 2222.9-5(b).

Since the State of Alaska filed its selection application prior to the date of occupancy, the land was segregated from settlement.

1/ On November 29, 1966, an appeal to the Director was dismissed because the appellant did not serve a copy of his notice of appeal or statement of reasons on the adverse party. The Department affirmed the Director and dismissed the appeal on February 14, 1967. However, the appellant subsequently furnished satisfactory proof that he had properly and timely served the adverse party and by decision dated March 13, 1967, the Department remanded the case to the Director for consideration on the merits.

Accordingly, the decision appealed from is affirmed.

Mr. Clark is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served is:

State of Alaska
Division of Lands
344 Sixth Avenue
Anchorage, Alaska 99501

Edward W. Stuebing
Chief, Branch of Land Appeals

Enclosure

DISTRIBUTION
Mr. Larry W. Clark (Certified mail)
State of Alaska, Division of Lands
Div. L&M S&T (4)
Div. L&M PM (2)
OPD (1)
Appeals List No. 1
JBJ

✓

Airport Lease: Cancellation 2235.1-1 (h)

Where on appeal from a decision to show cause why an airport lease should not be cancelled the lessee makes such a showing as merits further consideration, the case will be remanded.

City of Barstow, California, Los Angeles 0167488 (November 17, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 DEC 14 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Los Angeles 0167488

November 17, 1967

DECISION

City of Barstow, California : Airport Lease

Case Remanded

The City of Barstow has appealed from the decision of July 21, 1967, by the Riverside District and Land Office, by which the City was required to show cause why its airport lease should not be cancelled for noncompliance with the terms of the lease, i.e., the failure of the City to begin construction within six months of the issuance of the lease.

In its statement of reasons, filed in connection with the appeal, the City has offered a cogent explanation of its efforts to comply with the lease terms, the reasons for the delay and future plans for development.

Accordingly, the case is remanded for further consideration in light of this statement.

Newton Frishberg
Chief, Office of Appeals and Hearings

DISTRIBUTION

City of Barstow, Calif.
Hon. George Murphy, United States Senate
Hon. Jerry L. Pettis, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
EWS

appeal to Sec
affirmed A-30948 1-15-69

misc

Patents for lands sold by railroad carriers: Generally 2224.3

A railroad company asserting a right to patent on the ground that the land was excepted from a release filed pursuant to section 321(b) of the Transportation Act of 1940, under the innocent purchaser provision of the saving clause of this section, must show conclusively that the alleged purchaser is entitled to the estate transferred by the patent.

A railroad's conveyance of unpatented land to a bona fide purchaser does not qualify under the saving clause of Section 321(b) where the railroad subsequently reacquired the lands from its purchaser and the lands were restored to their original status.

Southern Pacific Company, S-351 (January 23, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 FEB 5 PM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
S-351

January 23, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Southern Pacific Company :
:
: Application for patent under Transportation Act of 1940
:

Decision Affirmed

The Southern Pacific Company, successor to the Central Pacific Railroad Company, has appealed from a decision of the Sacramento Land Office, dated July 28, 1967, which rejected its application for a patent for the $E\frac{1}{2}NW\frac{1}{4}$ Sec. 9, T. 26 N., R. 3 E., M.D.M., California. The application was filed pursuant to Section 321(b), Part II, Title III of the Transportation Act of 1940 (54 Stat. 954, 49 U.S.C. 65).

This appeal concerns the disposition of an 80 acre tract of public land which appellant has applied for as a part of an odd-numbered section within the limits of the grant to the Union Pacific Railroad Company and the Central Pacific Railroad Company by the Act of July 1, 1862, (12 Stat. 489) and the Act of July 2, 1864 (13 Stat. 356). The appellant's application was accompanied by its selection list #17 for the above described lands. The land office rejected appellant's application on the ground that the sale on which the Southern Pacific Company based its request for patent did not qualify within the meaning of the savings clause of the Transportation Act, supra.

The record shows that the original grantee, the Central Pacific Railroad Company, executed a quitclaim deed for the subject lands to the Sierra Lumber Company on January 4, 1899, although it had not received a patent to these lands from the United States. The lands were deeded back to the railroad shortly thereafter by Sierra Lumber on February 19, 1899. The rights to these lands later passed to the Central Pacific Railway Company on July 29, 1899, with a conveyance of all of the grantee's other holdings. The Central Pacific Railway sold all of its land rights and other interests to the Southern Pacific Land Company on September 2, 1930.

The appellant states in its statement of reasons that the Southern Pacific Land Company is entitled to claim the benefits of Section 321(b) of the Transportation Act of 1940 based on its position as successor in interest to Sierra Lumber. Section 321(b) of the act provided that if any land grant railroad wished to take advantage of charging higher rates for carrying Government traffic it must file a release of any claims it might have against the United States to land granted to the railroad. It specifically provided, however, that nothing in that section should be construed

> . . . as preventing the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value . . .

On October 28, 1940, the Central Railway Company filed a release with the Secretary which relinquished land claims in accordance with the 1940 act. The release specifically excepted lands sold by the Company to innocent purchasers for value prior to September 18, 1940. At the same time, the Company filed a list of persons to whom it had sold any of the unpatented or uncertified land with the limits of the railroad grants. Appellant has submitted a copy of the list which included the subject lands and named the Sierra Lumber Company of Tehama, California as its purchaser.

Appellant contends that the sale by the original railroad grantee to the Sierra Lumber Company on January 4, 1899, was a sale of land to an innocent purchaser within the contemplation of Section 321(b); that because this particular sale was made and later specifically excepted from the Central Railway Company's release appellants claim to these lands was not relinquished to the United States with that release. The appellant further submits that the railroad grantee's reacquisition of these lands from Sierra Lumber does not affect the applicability of the savings clause to these lands.

After carefully reviewing the history of the transactions involving this railroad grant we find that appellant's contentions are without merit. The question of what specifically constitutes an innocent purchaser from a railroad grantee was considered in United States v. Central Pacific Railroad Co., 84 Fed. 218 (Cir. Ct. N.D. 1898). The court stated:

> . . . The status of a bona fide purchaser is made up of three elements: (1) a valuable consideration; (2) absence of notice; and (3) the presence of good faith . . .

Also see McLaughlin v. United States, 107 U.S. 526 (1882); Western Pacific R.R. v. United States, 108 U.S. 510 (1882).

As applied to the facts of this case Sierra Lumber may have been an innocent purchaser for value when it took a quitclaim deed for these lands from the railroad grantee for $400.00. However, for the purposes of Section 321(b) the effect of this conveyance was immediately cancelled when the railroad reacquired the rights to the lands 6 weeks later, and the lands were restored to their original status. Although the Central Pacific Railroad Company may have acted in good faith and paid valuable consideration, it certainly was chargeable with notice of the true status of the lands reconveyed. The railroad must have known that it had not yet received a patent from the United States for these lands. It could not reacquire better title than it originally conveyed to Sierra Lumber. The railroad merely resumed its original position as grantee as though these transactions had never occurred. Therefore, under these circumstances the railroad was not an innocent purchaser, nor could it pass the rights of such status to its successors.

The language of section 321(b) indicates an intent to protect those who innocently purchase unpatented public lands from grantee railroads by allowing the Secretary of the Interior to convey title to such lands to the railroad for the relief and benefit of such bona-fide purchasers. It was not intended to operate for the benefit of the grantee railroad itself, or its successors, where the railroad subsequently reacquired the lands from its purchaser. In this situation the need to protect Sierra Lumber as an innocent purchaser was negated long before the enactment of the saving provisions of the Transportation Act of 1940. Therefore, a subsequent purchaser from the grantee or its successor must establish evidence of an independent qualifying sale prior to 1940 in order to claim the benefits of Section 321(b). The Department has held that one asserting a right to a patent under the innocent purchaser provision of the saving clause of Section 321(b) must show conclusively that the alleged purchaser is entitled to the estate transferred by the patent. Santa Fe Pacific Railroad Company, 58 I.D. 596 (1944). Appellant has failed to present conclusive evidence of the facts necessary to support its claim.

In this case appellant has predicated the rights of the Southern Pacific Land Company solely on its position as successor in interest to the Sierra Lumber Company. This claim must necessarily fail because, as discussed above, the rights of Sierra Lumber as an innocent purchaser under Section 321(b) of the Transportation Act of 1940 were completely extinguished by the reconveyance to the Central Pacific Railroad Company. Accordingly, the appellant has failed to bring its request within the saving clause of Section 321(b) of that act and the Land Office decision is hereby affirmed.

Southern Pacific Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION

Southern Pacific Company (Certified Mail)
Div of L&M S&T (4)
Div of L&M PM (2)
OPD
Appeals List No. 1
NKS

muse

Permits: Advertising Displays 2236.6

A decision summarily cancelling a special land-use permit for failure to comply with a nominal administrative condition imposed by the District Manager will be reversed where it is apparent that the permittees' omission was harmless and inadvertent oversight.

Lloyd S. and Catherine A. Sample, Riverside 291 (February 2, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 FEB 8 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Riverside 291
February 2, 1968

DECISION

Lloyd S. and Catherine A. Sample	:	Special Land-Use Permit
	:	
	:	

Decision Reversed

Lloyd S. and Catherine A. Sample have appealed from a letter-decision of the District Manager, Bakersfield, California, dated October 5, 1967, cancelling their special land-use permit because, "Condition 14 of the permit for advertising display, R-291, requires the submission of evidence of the State permit on this advertising display."

Appellants contend that they have now and have had since December 20, 1966, a permit issued by the California Department of Public Works (Permit No. 04552, Application No. 11781), and that the 1967 license is and has been attached in plain view to the contested structure.

Departmental regulation 43 CFR 2236.2-3(a) provides that, "Special land-use permits to erect and maintain advertising displays on the public lands will be issued on a form approved by the Director. . . ." Section 14 of the printed form approved by the Director, Form 4-972 (February 1963), is entitled "Special Conditions," followed by the typewritten proviso, "Evidence of State permit to be submitted in 60 days."

The case file contains a mimeographed form (Form 0401-2236-1, May 1965) with a heading showing that it was issued by the Bakersfield District and is entitled "Advertising Sign Policy." This policy statement states in part that:

> * * * SLUP applicants will be required to show evidence of an approved state permit within 90 days from issuance of the SLUP. (Underline supplied).

Thus, it appears that the Bakersfield District has not adhered to its own advertising sign policy statement as to the time required for compliance.

It is apparent from the record that a simple request to submit evidence of the State permit would have resulted in immediate compliance.

In reply refer to:
704
Riverside 291

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

February 2, 1968

DECISION

Lloyd S. and Catherine A. Sample : Special Land-Use Permit

Decision Reversed

Lloyd S. and Catherine A. Sample have appealed from a letter-decision of the District Manager, Bakersfield, California, dated October 5, 1967, cancelling their special land-use permit because, "Condition 14 of the permit for advertising display, R-291, requires the submission of evidence of the State permit on this advertising display."

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Thus, it appears that the Bakersfield District has not adhered to its own advertising sign policy statement as to the time required for compliance.

It is apparent from the record that a simple request to submit evidence of the State permit would have resulted in immediate compliance.

Therefore, since the permittees have met all of the standard requirements, the decision summarily cancelling the permit is reversed.

Newton Frishberg

Chief, Office of Appeals and Hearings

DISTRIBUTION

Lloyd S. and Catherine Sample
Div of L&M S&T (4)
Div of L&M PM (2)
OPD
Appeals List No. 1
MHS

Special Use Leases: Airport 2235.1 misc

Alaska: Segregation of Lands 2013.9-6

Where an airport lease application is filed for a clear zone easement over lands allegedly used or occupied by Alaska natives, the lease application is not subject to rejection until it is determined that (1) the use by the proposed lessee would be an appropriation of the land and (2) the claimed use or occupancy by the Alaska natives constitutes such use and occupancy as to segregate the lands from entry or appropriation by others within the meaning of the regulations and the Department's liberalized policy as to native use and occupancy.

Alaska Department of Public Works, Division of Aviation, Fairbanks 23 (March 6, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAR 21 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Fairbanks 23

March 6, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Alaska Department of Public :
Works, Division of Aviation : Airport Lease Application
:

Case Remanded

On July 27, 1966, the Alaska Department of Public Works, Division of Aviation, filed application Fairbanks 23 to lease certain lands for airport purposes, under the Act of May 24, 1928 (45 Stat. 728; 49 U.S.C. 211-214), as amended August 23, 1958 (72 Stat. 806). The lands are within secs. 6, 7 and 19, uns. T. 33 N., R. 33 W., Seward Meridian, Alaska, and are described as Tract II (Parcels 1, 2 and 3), and Tract III, containing a total of approximately 416 acres.

By decision of October 20, 1967, the State's application was rejected as to the conflict between Parcel 2 of Tract II and U. S. Survey 4311 which is included in trade and manufacturing site application Fairbanks 451. No appeal has been filed as to the rejection of the area in conflict and the airport lease application is considered closed to that extent.

The decision of October 20, 1967, also rejected the State's application as to Parcel 3 of Tract II because it is occupied by Alaska natives and is therefore not subject to entry or appropriation by others. The State has appealed from that portion of the decision which rejected its application as to Parcel 3 of Tract II, comprising 20 acres.

In its appeal the State contends that the decision erred and that mere occasional use does not constitute occupancy either as a matter of law or as contemplated by the regulation, 43 CFR 2013.9-3.

The regulation, 43 CFR 2013.9-3, reads:

> Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others.

In Herbert H. Hilscher, 67 I.D. 410 (1960), it was stated that:

> The word "occupied" as used in the Alaskan Allotment Act granting a preference right of allotment of lands occupied in good faith by Alaska Indians, Aleuts, or Eskimos, and

> also as used in the regulation * * * precluding entry on lands occupied in good faith by Alaska Indians, Aleuts, or Eskimos, means actual possession and use of land in something more than a slight and sporadic manner.

On October 25, 1963, the Secretary of the Interior approved a new policy, the purpose of which is to liberalize the standards as to what constitutes substantially continuous use and occupancy of Alaska lands by natives. Carl A. Charles, et al., A-29766, etc. (January 10, 1964). The question of good faith occupancy and use of Alaska lands by natives is also fully discussed in Solicitor's Opinion M-36662, 71 I.D. 340 (1964). These have all been incorporated into the regulations promulgated on March 20, 1965 (30 F.R. 3710). The pertinent portion, 43 CFR 2212.9-1(c)(i), reads:

> Definitions as used in the regulations in this section, (1) The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

In a letter of February 20, 1967, from the Fairbanks District and Land Office to the Alaskan Region, Federal Aviation Agency, the Acting Manager stated that "Tract II, Parcel 3 has been occupied intermittently for the past several years during the summer months and there are presently one building and two tents on the tract." The Area Manager, BLM, at McGrath, also reported that Parcel 3 has been used by native residents of Nikolai.

There is no clear showing in the record of the nature and extent of this use, nor any basis in this meager information upon which to determine whether this constitutes such use and occupancy as to segregate the lands from entry or appropriation by others (43 CFR 2013.9-3).

The record also fails to indicate what actual use of the lands is contemplated by the State's Division of Aviation in connection with the McGrath Airport. The State has not explained what is meant by the term Clear Zone purposes. The explanation should include such facts as what objects on the ground, if any, must be limited in height, and any actual on-the-ground use proposed for Parcel 3; or if the Division of Aviation requires only an easement to fly over the land at certain specified heights. It may well be that the proposed air easement, if that is what the State desires, will not constitute such an appropriation of the land as to interfere with the natives' alleged claim.

Accordingly, the record is remanded to the Fairbanks District and Land Office for appropriate action consistent herewith, and for such further determinations as the additional data elicited therefrom may warrant.

Edward W. Stuebing
Acting Chief, Office of Appeals
and Hearings

DISTRIBUTION
Alaska Department of Public Works, Division of Aviation
Div of L&M S&T (4)
Div of L&M PM (2)
OPD
Appeals List No. 1
LSH

Appeals Procedure: Generally 1840

An appeal to the Director, Bureau of Land Management, will be remanded where the State Director's memorandum of transmittal requests that the District Manager's decision be vacated.

Orion L. Fenton, Sacramento C4-S2 (April 2, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 APR 22 AM 10 00

In reply refer to:
704
Sacramento C4-S2

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

April 2, 1968

DECISION

Orion L. Fenton : Grazing Lease
:
Decision Vacated

Orion L. Fenton has appealed from a decision of the Folsom, California District Office, dated February 8, 1968, denying his application to lease certain decribed lands for the grazing of livestock.

The Acting State Director, in a memorandum dated March 20, 1968, has requested that the District Manager's decision be vacated because a conflict with another grazing lease application had not been considered.

Accordingly, the decision is vacated and the case is remanded for further consideration.

Edward W Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

DISTRIBUTION:
Orion L. Fenton
Div. of R, S&T
Div. of R, P.M.
OPD
Appeals List No. 1
MHS

Alaska: Headquarters Sites 2233.9-1

An application to purchase a headquarters site claim under the Act of March 3, 1927, is properly rejected where the claimant fails to show that he has occupied the land in the manner contemplated by the law and regulations.

Roy E. Longbotham, Fairbanks 030534 (July 2, 1968)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JUL 23 PM 2 48

In reply refer to:
704
Fairbanks 030534
July 2, 1968

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Roy E. Longbotham : Headquarters Site
:

Decision Affirmed

On November 20, 1962, Roy E. Longbotham filed a notice of location of a headquarters site under the Act of March 3, 1927, (44 Stat. 1364), as amended, for land now described as Lot 37, U. S. Survey No. 4117, Alaska. In his purchase application, filed on November 8, 1967, and supplemented by a formal application filed on November 30, 1967, he claimed that he was engaged in the water well drilling business. Reports of field examinations show that there were no improvements on the land until a building was placed thereon between October 11 and November 15, 1967. The report also indicated that there was no evidence on the site to indicate that a business had been started.

By decision of April 23, 1968, the Fairbanks District and Land Office rejected Mr. Longbotham's application to purchase the land because the applicant had not shown that at the time of filing his application he was engaged in the water well drilling business or that he was actively using the land in good faith as a headquarters for that business. The applicant has timely filed an appeal from that decision.

In his appeal and supporting papers filed therewith, the appellant shows only that he is planning to begin his well drilling business during the summer of 1968, and that he moved a small building onto the land at issue in November 1967. He states further, "If under the circumstances I am still not able to obtain the headquarters site, I would like to know if it would be possible to refile on this property and turn in another purchase application this summer after I have an active business started."[1] (emphasis added.)

Since there is a clear showing that Mr. Longbotham has not occupied the land in the manner contemplated by the law and regulations, it was proper to reject his application. The Fairbanks office decision is affirmed.

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840, see enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with

---

[1] Whether the appellant could "re-file" on the land would have to be determined at the time he submitted such an application, and would depend on whether the land was then available, and other factors. Information is available at the land office.

the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION
Mr. Roy E. Longbotham (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1

appealed to Sec
A-31034
Reversed 4-2-70

Cy in D.

Railroad Grant Lands 2224

Patent may be issued, pursuant to section 321(b) of the Transportation Act of 1940, for railroad grant lands sold by the railroad in 1888, where it has been determined that the land was not mineral in character at the time of the sale and the buyer was an innocent purchaser for value.

Where the Government fails to establish the mineral character of railroad grant lands at a hearing by showing that the known conditions on the critical date, July 26, 1888, were such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end, the decision of the Hearing Examiner in favor of the applicants for patent will be affirmed.

United States of America v. Southern Pacific Company, Sacramento 061438 (July 17, 1968)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JUL 29 AM 10 00

In reply refer to:
704
Sacramento 061438

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

July 17, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America :
v. : Railroad Grant Lands
Southern Pacific Company :
:

Decision Affirmed

The United States, by and through the Office of the Solicitor, U. S. Department of the Interior and the Office of the General Counsel, U.S. Department of Agriculture, has appealed from a decision of the Hearing Examiner, dated March 4, 1968. That decision held that the Southern Pacific Company, as successor in interest to the Central Pacific Railroad Company of California, and acting on behalf of the successors in interest of the railroad company's vendees, Frank V. and Gertrude L. Amoral, who are the real parties in interest, is entitled to a patent for Lot 2, Section 9, T. 17 N., R. 11 E., M.D.M., under the railroad land grant act of July 1, 1862, 12 Stat. 489, as amended by the act of July 2, 1864, 13 Stat. 356 and of section 321(b) of the Transportation Act of 1940, 54 Stat. 954, 49 U.S.C. 65(b) (1964). A hearing in this matter was ordered in accordance with departmental decision Southern Pacific Company, 71 I.D. 224 (1964). A Land Office decision, dated September 8, 1966, held that all 295.56 acres sold to the Washington Mining Company on July 26, 1888, except Lot 2 containing 20 acres, were nonmineral in character when these lands were purchased by the Washington Mining Company from the Central Pacific Railroad Company on July 26, 1888, and that the Washington Mining Company was an innocent purchaser for value. The Hearing Examiner's decision states that the issues as defined in the departmental decision are:

> 1. Whether Lot 2, exclusive of patented Mineral Survey No. 5365, was known by the purchaser to be mineral in character on July 26, 1888, the date the land was sold; and
>
> 2. Whether the Washington Mining Company was an innocent purchaser for value.

A motion by the Government at the hearing, to amend the issues to include approximately 1.75 acres of land, lying north of the South Yuba River, in Lot 5, Sec. 9 was denied by the Hearing Examiner.

The appellant alleges that the Hearing Examiner erred in denying the Government's motion to amend the complaint to include a portion of Lot 5 and in failing to hold that the Government had established a prima facie case showing that the land was mineral in character when it was sold to the Washington Mining Company. The Government contends that on July 26, 1888, the Central Pacific Railroad

believed the lands under consideration were mineral in character for apparently good reason, inasmuch as they were completely covered with stream gravel and at that time Frank White, the placer mine locator, actively defended the claim as to Lot 2 and a portion of Lot 5. Therefore, the portion of Lot 5 was also mineral in character when the railroad company sold the land in 1888. The Department of Agriculture is a party in interest in this case because all of the land in issue has been in the Tahoe National Forest since December 24, 1902.

The record shows that on June 8, 1962, the Land Office rejected the application for patent filed by the Southern Pacific Company on the ground that the land was mineral in character at the time of the grant. The Division of Appeals affirmed by its decision dated November 23, 1962, on the ground that approximately 12 mining claims adjacent to the lands under application were patented between 1887 and 1922 and this is prima facie evidence that the subject lands are mineral in character. The Division of Appeals also held that the Southern Pacific Company has not shown that the lands were nonmineral at the time of the grant. The Department set this decision aside and remanded the case for further consideration. The Department stated on page 232 of its decision that:

> * * *, to defeat the applications of Southern Pacific for the reason that the lands applied for are mineral, it must appear that the lands were of known mineral character at the date of the original sale by the railroad and that the purchasers should have known at the time of their purchase that the lands were excepted from the grant to the railroad. This rules out as irrelevant any consideration on the mineral character of the lands today or at the time when the line of the railroad was definitely located. The critical date is the date of sale by the railroad.

The Department explained this requirement on page 233 of its decision, saying that:

> * * * It is not essential that there be an actual discovery of mineral on the land. It is sufficient to show only that known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent lands and other desirable external conditions upon which prudent and experienced men are shown to be accustomed to act.

The transcript of the testimony at the hearing shows that the Bureau's mining engineer made mineral examinations of the land on November 1, 1965, November 11, 1965, June 22 thru 24, 1967, and July 25, 1967. (Tr. 11). This Bureau witness

testified that the area has a heterogeneous mixture of sand and gravel and, in general, it has a high boulder content. (Tr. 33). He took one qualitative sample of stream gravels to show the presence or absence of gold (Tr. 16) and he recovered 3 colors from a 66 pound grab-sample which had a combined weight of .36 milligrams or the equivalent of 1.6 cents per yard. (Tr. 60). He found no evidence of a quartz vein or lode on the property. Under cross-examination, this same witness testified that he had no personal knowledge of when this area was mined or whether it was mined or dug. (Tr. 76). He could not determine from the evidence of mining whether gold was recovered on the property as of July 26, 1888. Nor, could he determine from the various diggings on the land the actual mineral character of the land on July 26, 1888 (Tr. 79). The witness was not able to state unequivocally whether the land was more valuable for mining than for agriculture in 1888. 1/ (Tr. 83-84). There was no evidence that mining locator Frank White ever took any gold out of his claim prior or subsequent to 1888 (Tr. 79). Nor, were there any mint receipts showing that Frank White had ever sold any gold to the San Francisco mint or any other mint. (Tr. 88). The witness had recommended clearlisting of the entire 295-acre area, except Lot 2 and the only reason for the exception is Frank Whites' mining location. He recommended disallowing the clearlisting of Lot 2 because the tract was "believed" to be mineral in character at the time of the original sale. (Tr. 91). The appellee's witness testified that Frank Whites' claim was located in 1885 and there is no record that he had transferred his claim to others. (Tr. 138). This witness drilled 3 test pits on the tract; the first one was dug seven feet down to bedrock and it resulted in a recovery of four colors of gold worth less than one cent, (Tr. 117) no gold was recovered from pit number two, (Tr. 122) and less than one cent in value was recovered from 9 cubic feet of soil from pit number three. (Tr. 122). Much of the transcript was also taken up with testimony about the core sampling of the trees on the land for the purpose of determining their age.

The test which the Department has set for defeating the application for patent requires proof that the land was of "known mineral character" on July 26, 1888. "Mineral character" within a statute reserving mineral land to the United States may be established by any satisfactory evidence, including geologic inference. State of California, et al. v. United States, 57 I.D. 142 (1940). However, the proximity of valuable mines is not sufficient to establish the mineral character of lands. Austin v. Mann, 56 I.D. 85 (1937). Also, the fact that the lands are in a mineral country is insufficient. United States v. Plowman, 216 U.S. 372 (1910). Known conditions must be such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. State of California v. Rodeffer, A-30611 (June 28, 1968), and cases therein cited. The Department has frequently declined to hold lands mineral in character where the evidence of mineralization was so slight as not to afford encouragement for mineral exploration and development, and where there was nothing in the geological conditions or in the local environment to induce the

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1/ This determination is no longer required. See State of California v. E. O. Rodeffer, infra.

belief that the land was valuable for mineral. To establish the right to a patent, it is incumbent upon the railway company, when the character of the land is called into issue, to furnish clear and convincing evidence that the lands are of the character subject to selection. *Central Pacific Railway Co.*, 43 I.D. 545, 547 (1914). The question, however is one of fact - not of law *Standard Oil of California* v. *United States*, 107 F 2 402 (9th Cir. 1939). The mere possibility that land may contain a mineral deposit does not, by itself, establish the mineral character of the land, and an affirmative finding based on nothing more than are inference would be error *State of California* v. *Rodeffer*, *supra*.

No evidence has been submitted showing that the Washington Mining Company believed or had any reason to believe from any known conditions that the land was of known mineral character on the date of the sale. No evidence has been tendered which shows that the 1885 mining claimant had proceeded to a point of development whereby the presence of mineral values could be demonstrated. It is reasonable to assume from the evidence presented at the hearing that the 1885 mining claim reflected no higher mineral values prior to July 26, 1888, than it did in 1965 and 1967. Although some colors of gold have been found on the land, the appellant's principal contention appears not to be based on geologic inference, but on the fact that one man had located a mining claim thereon. The value and significance of this evidence, standing alone, is not impressive. Nor can the evidence of two small pits, a prospect shaft and some old ditches be accorded great weight, particularly in view of testimony that the ditches may have served as aquaducts for irrigation or a domestic water supply for a townsite. On the other hand, the evidence regarding the geology of the land in question and the history of mining in the area is persuasive in support of a finding that the land was not known by the railroad company or its vendee to be mineral in character on July 26, 1888.

In view of the foregoing, it was properly held that the Washington Mining Company was an innocent purchaser for value. See *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498 (4th Cir. 1952).

ccordingly, the Hearing Examiner's decision is affirmed as to Lot 2 and the 1.75 acres of land in Lot 5.

The Office of the General Counsel, United States Department of Agriculture, on behalf of the United States, is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. No filing fee is required. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of showing wherein the decision appealed from is in error.

In the event of an appeal the adverse parties to be served are:

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Enclosures

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Frank V. and Gertrude L. Amoral
Hon. Harold T. Johnson, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Division of Watershed Management, Forest Service, U.S. Department of Agriculture (12)
Appeals List No. 1

Alaska: Homesites Notice of claim 2233.9-2

Despite construction of improvements and long residence on the land, the subsequent imposition of a reservation for a native village will bar recognition of the entry where the claimant fails to file his notice until eleven years after it was required by the Act of April 29, 1950.

Alaska: Homesite Claims Generally 2233.9-2

The legal heirs or devisees of a homesite claimant may, within the 5-year statutory life of the entry, perfect a homesite claim and receive title thereto, all else being regular.

Estate of Peter N. Bahls Fairbanks 028598 (July 29, 1968)

BUREAU OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 AUG 6 PM 2 40

In reply refer to:
704
Fairbanks 028598

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 29, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Laurence O. Bahls, :
Co-Executor, Estate of : Homesite Claim
Peter N. Bahls :

Decision Affirmed as Modified

Laurence O. Bahls has appealed on behalf of the Estate of Peter N. Bahls from a decision of the Fairbanks Land Office, dated July 16, 1964, cancelling the homesite claim of Peter N. Bahls (Deceased), notice of which was recorded on October 31, 1961. The claim to the homesite was made pursuant to the Act of May 26, 1934, 48 Stat. 809, 48 U.S.C. § 461 (1964).

The decision recites that although Peter N. Bahls claimed residence on the land involved since 1910, he could not be given credit for this residence prior to October 31, 1961, because he failed to record his Notice of Settlement or Occupancy Claim prior to that date, or within 90 days after April 29, 1950, as provided for by the applicable regulations 43 CFR 2233.9-2(b) and (d). 1/ The decision also recites that, Peter N. Bahls, the claimant, was required to live on the claim for 5 months each year for three separate years thereafter, but that by letter dated March 29, 1962, he informed the land office that he was visiting relatives "in one of the lower 48 states", and that on June 4, 1963, Albert N. Bahls, one of the Co-Executors of the Estate, informed the land office that Peter N. Bahls had passed away. Consequently, he could not have complied with the regulations as to residence requirements to qualify him to purchase the land before his demise. The decision concludes that there are no precedent decisions nor is there an existing regulation to permit the heirs or estate of a deceased claimant under the settlement claim laws (i.e., Headquarters Sites, Trade and Manufacturing Sites, and Homesites) to perfect the decedent's claim.

The appellant states, in pertinent part, the following as his reasons for the appeal:

> On October 26, 1961, my father, Peter N. Bahls, filed a Notice of Location for a Homesite in Unalakleet, Alaska. Form 4-1154 was completed and together with the initial filing fee was submitted to the Bureau of Land Management, Fairbanks, Alaska. As indicated on the form, this land had been occupied by my parents and family (three sons and daughter) since the year 1910. During this time improvements, consisting of a dwelling, cache and storage sheds, had been made. After our mother passed away in 1942 and we children moved elsewhere for schooling and work, our

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1/ See 48 U.S.C. §§ 371a, 371b, and 461a (1964).

> dad continued to live on the homesite and conduct a small trading buisness there. Except for visits to his family and relatives elsewhere and for medical attention, he lived there continuously.
>
> During the winter of 1962, he temporarily closed his business in Unalakleet in order to visit his sons and daughter and other relatives and seek medical attention in the continental United States. He was not feeling too well at the time and felt that rest and medical care would restore his health. He left the property in the care of his sister-in-law, our aunt, Miss Mary Bahr of Unalakleet, who is also the commissioner there.
>
> After visiting his daughter (our sister) in Pennsylvania, he felt considerably improved and decided to take a trip to Norway. He so advised the Land Office in Fairbanks by letter dated March 29, 1962. While in Norway, he suffered a heart attack and had to be hospitalized, followed by a long period of recuperation and convalesence. As indicated in letters to his family and Grocery Wholesalers in Seattle, he still intended to return to Unalakleet, Alaska and re-open his business. During the spring of 1963 he expressed his desire to return to the United States but was still very weak therefore obtained an extension of his visa and later spent some time in a convalescent home for the aged. In November of 1963 his doctor advised him that he should have a hernia operation. He was greatly weakened by this ordeal and was hospitalized for much of the time. Following another long convalesence, he returned to the United States but in his weakened physical condition, the trip proved too much of a strain and he died on May 16, 1964, at his daughter's (our sister's) home in Pennsylvania.
>
> I have presented the above information in order to bear out several facts and the extenuating circumstances which made it impossible for our dad to reside on the property for the minimum stipulated time during the years 1963 and 1964. However, he and his family did occupy the land for more than 50 years prior to that time. He did make improvements on the land and definitely intended to return and continue residence on it. Also, when he left, the buildings and land were left in the care of a relative who is also the commissioner.
>
> As you are aware, about the turn of the century, many Alaskans built houses on land in Alaska and occupied this land under the provisions of "squaters rights." When the homesite act was enacted, many were not aware of this law which permitted them to obtain a patent to their land and continued to reside on the property without filing for a patent.

The appellant concludes that it is his belief that the appeal is justified, and that the original decision rendered in the Fairbanks Land Office was made on the basis of incomplete information concerning the case. He also asserts

that his brother Albert, who with himself is Co-Executor of his father's estate, was at the time of the filing of the appeal in the State of Alaska, but his work required him to travel considerably and as a result it was difficult to communicate with him; and, that he himself intends to return to Alaska the following year (which at that time was 1965).

The land office decision was in error in holding that there is no precedent for permitting the heirs of a deceased locator to perfect the decedent's claim. The Department in a number of cases involving settlement on public lands, has held that under the laws of descent any estate belonging to a man at the time of his death shall inure to his legal heirs, and an unperfected homestead or desert land entry is considered part of his estate with the right of the heirs or devisees to complete the entry under the applicable law and receive a patent thereto. Tobias Beckner, 6 L.D. 134 (1187); Lovina Shadick; 48 L.D. 26 (1921); Gasquet et al., v. Butler's Heirs et al., 28 L.D. 343 (1899) (On Review). In the latter case it was said that:

> The Department is not aware of any law providing for the acquisition of title to public land which does not permit either the widow, heir, or transferee of a deceased entryman to succeed to his rights and perfect his claim to the land.

Although the above-cited cases involved homestead or desert land claims, it is our opinion that the same principle would apply to homesite cases under the Act of May 26, 1934, supra. Therefore, the land office decision is modified to this extent as a matter of information, although the case does not turn on this point.

The claimant, a naturalized citizen of Alaska, settled on the land in 1910. Subsequently, the land was included in an Indian Reservation for the occupancy and use of the inhabitants of the Native Village of Unalakleet, Alaska, by proclamation dated December 10, 1941, by the then Assistant Secretary of the Interior, pursuant to the authority vested in the Secretary of the Interior by Section 2 of the Act of May 1, 1936, 49 Stat. 48 U.S.C. § 362 (1964). This proclamation reserved some 870 acres of public and non-public land and waters, as described by metes and bounds therein, including the subject land, and which also included 40 acres of land previously reserved by Executive Order of March 30, 1901, for educational purposes. This order specifically provides that it shall be subject to any valid existing rights or claims acquired prior to the date thereof, and shall become effective only upon its approval by a majority vote of the natives residing in the described area, voting in the manner prescribed by said Section 2 of the Act of May 1, 1936, supra. This order, or proclamation was ratified by the Natives on April 20, 1942. This reservation is still in effect.

It should also be noted here that although the claimant settled on the land in 1910 primarily as a homesite, he has since conducted what appears to have been a rather substantial business enterprise on the land, and had he timely recorded his notice of location he might have claimed the land as a Trade and Manufacturing Site claim under the Act of May 14, 1898, 30 Stat. 413, 48 U.S.C. § 461 (1964).

The Act of May 14, 1898, (30 Stat. 409) made provision for the claim and purchase of lands possessed and occupied by citizens for purposes of trade, manufacture, or other productive industry without any requirement for prior notice of location in the land office. 2/ As previously stated, it appears that the decedent could have qualified under that law, although he made an election later to seek title under the homesite amendment, enacted May 26, 1934. That act also contained no requirement for notice in the land office. The law which created a requirement for notice in the land office was not enacted until April 29, 1950. 64 Stat. 95, 48 U.S.C. 461 a, (1964). Therefore, it cannot seriously be contended that a resident legally in possession for more than 30 years prior to the imposition of a reservation (which was made subject to valid existing rights) was suddenly divested of his interest either by the proclamation of the reservation of December 10, 1941, or by the ratification thereof voted by the natives on April 20, 1942.

The question then arises as to the effect of Peter Bahl's failure to file the notice described and required by the Act of April 29, 1950, supra. The act provides that any person who on that date was maintaining a settlement claim on surveyed or unsurveyed land in Alaska should file notice of the location of his settlement claim in the land office for the district in which the land is situated within ninety days. 43 U.S.C. 371 (1964). The statute further provides that, "Unless such notice is filed in the proper office within the time prescribed the claimant shall not be given credit for the occupancy maintained in the claim prior to the filing of (1) a notice of the claim in the proper district land office, or (2) an application to purchase, whichever is earlier." Obviously, if he had filed his notice within the prescribed period he would have received credit for his prior occupancy and preserved his interest, regardless of the reservation which had been imposed on the land some ten years earlier. But he failed to file within the prescribed period and for nearly ten years thereafter and, as stated above, the statute expressly precludes him from credit for any occupancy prior to the time of his filing on October 31, 1961.

Is the meaning of the phrase "credit for the occupancy maintained in the claim" limited to credit for past residence as a qualification for patent? We find nothing which suggests that is so. We construe the meaning of the statute to be that no credit for the occupancy of the claim can be given for any purpose. We are, therefore, precluded from considering his occupancy before the filing of the notice, at which time the claimant had to be regarded as a new claimant who had never previously lived on the land. The reservation which had been imposed on the land 20 years before barred his entry just as effectively as it would have barred any other locator who sought to appropriate the land. Albert L. Scepurek, A-28798 (March 27, 1962); Lawrence L. Bunker, AA-2112 (March 11, 1968). The risk of loss through the establishment of some intervening right or interest is an inherent feature of virtually all recording statutes.

2/ The record does not indicate whether Bahls had ever filed a notice in the "recording district" of the Territory of Alaska, as was once required, but this is not relevant to this case.

Even assuming, *arguendo*, that we could find that his interest in the land had somehow survived his failure to file the notice of location timely and the effect of the reservation of the land, the claim would still fail to qualify for two other reasons. First, there has not been a showing of sufficient residence on the land since the filing of the notice, as held in the land office decision,,and second, the five year statutory life of the entry has since expired and no application to purchase has been filed, as required by 43 CFR 2233.9(b). *Severin F. Ulmer, Heir of Joseph Ulmer, Deceased*, A-30375 (August 11, 1965).

Accordingly, the land office decision is affirmed as herein modified.

We do not reach this conclusion with any enthusiasm. In fact, the long delay in rendering this decision was occasioned by the several exhaustive reviews of the case by various officials of the Bureau. The writer derives a modicum of satisfaction from the knowledge that this pioneer Alaskan reared his family and lived out his lifetime undisturbed in the home that he built on the land of his choice.

The executors of the estate of Peter N. Bahls are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures 2

DISTRIBUTION

Mr. Laurence O. Bahls (Certified Mail)
Mr. Albert N. Bahls (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1

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DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 AUG 13 AM 10 03

LO
appeal to Sec
A-31045
affirmed in part
Vac. in part - remanded 2-6-70

Timber Sales and Disposals: Generally -- Breach of Contract -- Damages

Where the terms of a timber sale contract provide that written permission and pre-payment of purchase price are required before any trees included in an additional sale may be cut, the cutting and removal of such trees without written permission or pre-payment is a taking not contemplated by the contract and for which no other authority exists. It must, therefore, be regarded as a taking in trespass.

Where contractor's servant and Bureau's representative orally agree on the trees, timber volume and price which will constitute an additional sale as a modification of an existing timber sale contract, and the contractor's chief executive officer subsequently disputes the volume agreed upon and refuses to pay the price stipulated, he may not thereafter rely on the agreement which he so repudiated as his authority for removing the additional timber without the required pre-payment and advance written permission.

Trespass: Generally - Measure of Damages -- Timber Sales and Disposals 9239

Where State law provides for treble damages for the willful taking of trees in trespass and double damages where the taking is casual or involuntary, the measure of damages will be assessed according to the circumstances in each instance of unauthorized removal.

Forest Management, Inc., California 14-11-0008(2)-160 (July 31, 1968)

In reply refer to:
704
California 14-11-0008(2)-160

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 31, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Forest Management, Inc. : Timber Sale Contract (Trespass)
:

Decision Affirmed as Modified

Forest Management, Inc., has appealed from a decision of the District Manager, Redding, California, dated July 24, 1967, demanding a payment of $1,265.96, assessed as double damages for the removal of 20.6 M bd. ft. of timber from certain public lands embraced in the above-identified timber sale contract.

The decision below recites, among other things, that (1) the measure of damages resulting from the timber trespass on public lands, which the Bureau of Land Management must collect, is determined by the law of the state in which the trespass occured, and (2) the California statute provides that for wrongful injuries to timber, trees, or underwood of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except under certain circumstances specified in the statute. Section 3346, California Civil Code. The District Manager concluded in the decision that before any settlement could be made in the case for less than treble damages, the appellant would be required to tender the payment of double damages, such payment to be accompanied by a signed statement setting forth the facts upon which the appellant bases a contention that the trespass was within the conditions discussed in the State law cited, the offer tendered by the appellant company to be considered in the light of the facts available. Attached to and made a part of the decision is an information sheet which, among other things, indicates the number of trees in each species cut, and the merchantable volume thereof.

On appeal the appellant contends, among other things, that there was in no case any deliberate trespass and in fact that most of the volume of timber cut was not in trespass at all, and asserts that:

> The principal contention of B.L.M. as to the largest of this 20.6 M bd. ft. is apparently derived from the following situation: Their timber sale officer, Mr. Ken Roegner, marked some additional trees for cutting (in part damaged by logging and in part overlooked in the original marking) in the company of our logging Superintendent, Mr. Everett Scott (also Vice President of Forest Management, Inc.). The two representatives agreed to sell and purchase this small additional volume and the trees were then felled,

some at least in the presence of the Timber Sale Officer. The District Manager has since contended that this constitutes a trespass, on the theory that his Timber Sale Officer had no authority to sell and Mr. Scott has no right to buy (which right indeed he does have) said trees. Their argument here is, to us, too rediculous to require further comment.

The District Officer further contends that the balance of this claimed volume is derived from several sources. Specifically, his claim is as follows:

(1) That we removed a few trees which had not been marked, (no stump mark visible).

(2) That we removed two trees which had been marked, but then scratched out with an axe.

(3) That we removed 1020 bd. ft. from a snag they had failed to mark for falling and which was felled anyhow.

(4) That we removed logs from a few small trees knocked down in the course of falling.

Our answer to the above claim is as follows:

(3) We did indeed fall said snag, and proving sound, the faller cut two logs out of it. This is in most instances the normal procedure and is required by state law. In this case, if it violated the letter of the contract, such violation was technical and relatively inconsequential.

(4) It is also true that the fallers at first, out of habit, bucked logs from a few small trees which had been knocked over by falling other timber. We reported this to the Timber Sale Officer himself and still stand ready to pay for this material if required.

(1&2) As to the removal of any other unauthorized trees, we emphatically deny that this was done.

(a) Enclosed are affidavits or certifications by Mr. Scott and Mr. David Richmond, the senior faller, stating that no deliberate cutting or removal of unmarked trees took place (except as noted above).

(b) No one claims to have observed any unmarked trees being removed (except as again noted above). The District Office appears to base their entire contention on factors relating to stump count and painted stumps.

(c) Stump marks besides being likely forgotten by the marker could have been scuffed off in the operation, or perhaps, more likely have been marked too high on the uphill side of a tree thus resulting in its elimination by a low stump. It should be noted that this was not prevalent but amounts to a claim based on relatively few stumps.

(d) By "demarking", the District axed out the blue stripes on some trees taking them off the cut category. They contend that two of these were cut anyhow. This could have occured, but not deliberately. In almost all cases come paint still existed on these trees, and in one instance from about 100', I observed and checked one such tree with a stripe which I thought had been missed. The fallers had left it but might easily have, after an initial look, gone ahead and felled it (please note picture-although blue colors fail to stand out well on this film).

(e) The natural human error together with our personal familiarity with some past instances of inexperience and fallibility of the Redding District make the likelihood of some occasional mistakes in properly crusing, marking, or demarking stumps quite high. This includes specific cases of their personnel (foresters) failing to properly know the differences between Sugar and Ponderosa Pine and between White and true Red Firs; and also their unfamiliarity with the use of surveying instruments causing roads to be located with excessive grades. We realize that this District also has some high caliber personnel but it is important that we point out known cases of errors which make failures to mark stumps or note trees cruised rather minor by comparison.

(f) Another indication of the inaccuracies of work on this sale is their (B.L.M.) refusal to provide us with the results of a crusing and scaling school

> held for their personnel on this sale. The reason given for this refusal was due to the "embarrassing" (B.L.M.'s word) variations and discrepancies. It should be pointed out that at some expense we had taken in a crew, at the B.L.M.'s request, to fall selected trees some months prior to our actual logging in order that this school could be conducted.
>
> (g) This sale developed a 38% underrun with the alleged trespass volume included. An underrun volume can be attributed to numerous sources, but in this case, conditions were perfect for good correlation between scale and cruise. Specifically (1) our forester's check scale of the receiving mill was very satisfactory, (2) the principal specie involved, Ponderosa Pine, is acknowledged easy to cruise, low defect tree, (3) topography was good, lending toward easy cruising and little breakage, (4) the cruise was conducted on a 100% basis, eliminating any sampling error, (5) we feel will reveal good log utilization. It is therefore our contention that in light of these conditions, the cruise was in some degree inadequately conducted in the first place."

The appellant concludes that due to the staining of the logs cut at the training school it lost in excess of $500, and requests that it be reimbursed in this amount. The appellant also concludes that the majority of the trees in question were of very marginal value to it due to their size, quality and sparsity, which fact militates against the likelihood of any willful trespass on its part in this case.

The contract in question was authorized under the Materials Act of July 31, 1947, 61 Stat. 681, as amended 30 U.S.C. §§ 601-604 (1964). The one-year contract, which was prepared on Bureau Form 5430-3 (Jan. 1966), was effective beginning June 28, 1966. It involved, originally, the purchase of a total of 502 M bd. ft. of timber valued at a total of $14,936.20, based on the per unit price for each species of tree as set forth in Section 3 of the contract.

Section 8 of the subject contract provides in pertinent part that:

> If the authorized officer determines that the removal of timber from the contract area, not sold under the contract, is necessary for the normal conduct of the logging operation, and if such removal is in the interest of the Government and

> not contrary to provisions of 43 CFR 5421.1, the authorized officer shall grant written permission to the purchaser to cut and remove such timber. If permission is granted, the purchaser shall pay for such timber at the appraised price determined by the authorized officer in accordance with Bureau of Land Management prescribed procedures. The value and volume of such timber shall be added to the total purchase price of the estimated volume of timber sold in this contract. Payment for such timber shall be made in accordance with Section 3 (b) of this contract, except that, if all contract installment payments required by Section 3 (b) have been made, payment for such timber shall be made in advance as a condition of granting such permission.
> (Emphasis supplied.)

It is apparent from the record that it was the intention of the authorized Bureau officer to modify the subject contract under the provisions of Section 8 of the contract, to allow for the purchase and removal of the 30 additional trees marked for cutting. The two basic requirements of this section that were to be observed before removal of the additional timber were: (1) the purchaser must have written permission, and (2) where all of the installments had been paid on the original contract, advance payment must be made for the additional timber.

The original sale involved an area of land which was pending transfer to the Paradise Recreation and Park District of California, pursuant to the Recreation and Public Purposes Act of June 14, 1926, as amended 68 Stat. 173 (1954), as amended, 43 U.S.C. § 869 et. seq. (1964). For this reason, certain special requirements were inserted in the contract to protect the site for recreational development. Preliminary marking of the timber prior to sale was done by BLM foresters after consultation with Paradise Recreation and Park officials. Representatives of that District subsequently requested that a few of the trees marked for cutting in the original sale be reserved. These trees were then demarked by BLM foresters by chipping off with an axe or hatchet the blue paint used to mark them for cutting before the sale was held.

Late in the summer of 1966, BLM foresters arranged with the appellant company, the successful bidder at the above-mentioned sale, to fell and buck a few of the trees in the sale area, so that trainees at the cruising school being conducted in the area by BLM could check them by observation and scaling them on the ground.

The training session was conducted in October 1966, and the trees were felled on October 20 and 21 of that year. Shortly thereafter the appellant decided not to continue with the logging of all of the area, and left the felled logs in the woods over the winter months. Logging operations were again resumed sometime in March, 1967.

On or about May 15, 1967, a field examination of the sale area was made by the designated BLM forester in charge, in company with Mr. Scott, Vice-President and Logging Superintendent of the appellant company. Mr. Scott, on behalf of the company, agreed with the BLM forester that certain additional trees should be cut. These trees were then marked with red paint. It was orally agreed by the company representative and the BLM forester that the price for the additional trees was to be the same as the appraised price established for each species in the original sale. The logging of the original sale at this time had progressed to the point where the last installment had been paid. The BLM foresters were advised at this time that logging operations were almost complete, and that the operator planned to move the logging equipment out of the area on or about May 17, 1967. BLM foresters finished marking the additional trees to be removed by May 15, 1967.

By the terms of Section 8 of the contract, supra, written permission to cut could not be given until the pre-payment was received. On May 17, 1967, and before written permission could be given to the appellant to remove the additional trees marked by the BLM foresters, a difference of opinion developed concerning the value and volume of timber contained in the trees, which included the trees marked with red paint for removal, and several unmarked trees that had been cut in the logging operations. Mr. Hall, President of the appellant company, objected at this time to the price and volume, and stated that he would not pay for the trees.

The District Manager made a memorandum of this conversation for the file in which he states, "I told him (Mr. Hall) we could not force him to buy the additional timber and that this type of sale had to be by a contract modification that was mutually acceptable." An oral request for payment made by BLM foresters at this time was made in the amount of $838.79. This included the purchase price of $482.56 for the 30 additional trees marked for cutting, on the single stumpage as agreed to by BLM foresters and Mr. Scott, and a payment of $376.23 as double stumpage value for 9 unmarked trees purportedly removed in trespass. A subsequent stump count was made in the sale area by BLM foresters in the early part of June 1967, at which time it was reportedly discovered that there were 12 more stumps of trees marked with blue paint that had been cut than were shown in the original contract tally sheets. This field examination also disclosed that 30 additional trees marked in red for cutting had been removed.

A meeting attended by the District Manager and the president of the company was held on July 18, 1967, and the president, who was apprised of the removal of the timber and the stump count by BLM foresters, again refused to agree to the volume or purchase price established by the District Manager for the additional timber removed. At this meeting the District Manager informed Mr. Hall that because he was unable to positively account for the difference in stump count, the trespass determination by BLM did not include volume for the 12 additional blue-marked trees. The trespass

demand was therefore limited to trees cut that were either unmarked or marked with red paint. The appellant company was thereupon billed for the amount of $1,265.96, as double stumpage for the removal of these additional trees. This amount covered removal of the 30 trees marked for cutting, and 5 unmarked trees purportedly cut in trespass. This represents an adjustment of 4 unmarked trees less than the District Manager claimed were cut in trespass.

Where one party to a contract refuses to perform except on material modification or addition of new terms, such conduct amounts to "repudiation". Jorden v. Madsen, 225 P. 570, 573. The contingent agreement reached by the two field representatives was repudiated by the president of the appellant company, by his repeated refusal to pay for the timber in question at the price agreed upon and by his rejection of the agreement as to the timber volume. It has been held in such cases that an absolute repudiation of a contract by one of the parties thereto constitutes a breach thereof for which he is liable in damages. See Mutual Loan Soc., v. Stowe, 15 Ala. App. 293, 73 So. 202; Timmerman v. Stanley, 123 Ga. 850, 51 S.E. 760; Johnson v. Tackitt, 173 Ky. 406, 191 S.W. 117; Anderson & K. Drilling Co. v. Bracht, 177 Okla. 394, 60 P. 2d 758; Lewis v. West Virginia Pulp & P. Co., 76 W. Va. 103, 84 S.E. 1063. It has also been held that if a contract provides for a series of acts and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform but may treat the refusal as a breach of the entire contract and may recover accordingly. Mobley v. New York L. Ins. Co., 295 U. S. 632 (1935); Roehm v. Horst, 178 U. S. 1 (1900); United Press Assoc., v. National Newspaper Assoc., 237 Fed. 547 (8th Cir. 1916).

In view of this repudiation of the agreement by the appellant and the refusal to make the required pre-payment of the purchase price, the failure of the District Manager to grant written permission to cut the 30 trees in the additional sale was not only justified, Restatement, Contracts §§ 316-318 (1932), but dictated by Section 8 of the contract between the parties. Moreover, the appellant, having repudiated the agreement, may not now rely on that agreement as his authority for removing the additional timber without the required pre-payment and advance written permission. Accordingly, the Bureau is entitled to a payment of damages for willful trespass for the 30 additional trees marked in red for cutting.

As for the five unmarked trees removed by the appellant in its logging operations, while we do not condone the taking of timber from public lands that is not covered by a contract or purchase agreement, we are inclined to agree with the appellant in this case, that the cutting of the trees, with the possible exception of the dead snag, which it admits cutting in accordance with its usual logging practices, was not deliberate, and to a certain extent was an unavoidable consequence of its logging operation. Therefore, the taking of these trees may be regarded as a "casual or involuntary" trespass within the meaning of section 3346 of the California Civil Code, and no demand will be made for treble damages on this account.

We conclude then that the appellant must be required to pay for all of the additional timber removed from the sale area, including the payment of damages for willfull trespass in the removal of the 30 trees marked in red, and double damages for the 5 unmarked trees.

We cannot agree with the appellant that it should be reimbursed for the purported loss sustained by it because of the staining of the logs felled in the fall of 1966 in connection with the BLM cruising school, since it appears from the record that it was the appellant's own negligence in not removing the logs from the sale area that caused the loss. The Bureau did nothing to prevent their removal. The damage was foreseeable by the appellant. Furthermore, under Section 7 of the contract in question, it is provided that the risk of loss shall be borne by the purchaser after the timber is cut. Johnson Forest Products Co., Oregon T. S. #14-11-0001-(9)-1450 (November 22, 1965).

As to the appellant's claim that there was a 38 percent underrun of the timber sold in the original contract, it presented no factual data whatsoever to substantiate this claim. Moreover, it has been well established that under the terms of the contract, as provided in Section 3 (a) thereof, the purchaser is liable for the full purchase price, even though the quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown in said section of the contract. See Russell & Pugh Lumber Company v. United States, 290 F. 2d 938 (Ct. Cl. 1961); Thompson Timber Company, A-30114 (June 23, 1964); Main Lumber Company, A-30200 (July 7, 1964); Cascade Plywood Corporation, A-28547 (January 31, 1961). Accordingly, the appellant's request that it be reimbursed in the amount of $500 purportedly lost because of the staining of the trees felled in connection with the BLM cruising school, must be denied, and no adjustment based on an alleged underrun of 38 percent in the amount of timber purchased under the original contract will be considered.

The decision appealed from, as modified herein, is affirmed.

When this decision becomes final, the case will be remanded to the District Manager, who will allow the appellant a reasonable time within which to remit the total amount due for the additional timber removed from the sale area.

Forest Management, Inc., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal

there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Newton Frishberg

Chief, Office of Appeals
and Hearings

Enclosures (2)

DISTRIBUTION

Mr. Matthew E. Marsh, Attorney for Appellant (Certified Mail)
Forest Management, Inc.
Div. of Forest Management (4)
Div. of Resources S&T
Appeals List No. 1

Cemetery Sites: Purchase Price 2231.3 misc

The purchase price established for the sale of land for cemetery purposes under the Act of March 1, 1907, will not be disturbed where it is based upon a thorough and well documented appraisal and the appellant offers no evidence to show the appraisal is erroneous.

Victor Valley Memorial Park, R 07756 (September 25, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 OCT 7 AM 10 00

In reply refer to:
704
R 07756

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

September 25, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Victor Valley :
Memorial Park :
: Cemetery Site
:

Decision Affirmed

The Board of Directors of the Victor Valley Memorial Park has appealed from a decision of the Riverside District and Land Office, dated July 23, 1968, which allowed the board's application to purchase the E½ NW¼ Sec. 21, T. 6 N., R. 3 W., S.B.M., California, for a cemetery site. In order to complete the sale the appellant was required to submit the full purchase price in the amount of $27,000 and to provide a notice of publication of the sale in accordance with the regulations.

Appellant asserts that the purchase price of $27,000 is very much out of line with the present value of this land; that some consideration should have been given to the fact that the organization is a nonprofit organization, and that the land is being purchased for a cemetery to provide burial for the people in the low income bracket in Victor Valley.

Appellant has applied to purchase this tract under the Act of March 1, 1907, 34 Stat. 1052; 43 U.S.C. 682 (1964) which authorizes the Secretary of the Interior to sell and convey lands for cemetery purposes only to religious, fraternal associations or private corporations, organized or incorporated to hold lands for such purposes. The applicable regulations thereunder, 43 CFR 2231.3, require that the purchase price be fixed by appraisal of the fair market value of the lands but at not less than $1.25 per acre and must be paid before patent will issue.

In light of these requirements, the sole question presented is whether or not the present appraisal properly reflects the fair market value of the tract in question. Although the appellant feels that the determined value of $27,000 is excessive he has failed to provide any substantial evidence that shows this appraisal to be in error. The case record shows that the fair market value of the land was based upon an appraisal made by trained Bureau personnel, utilizing established procedures, including an examination of the prices of comparable lands recently sold in the area. Moreover, in view of the proposed restrictive use for cemetery purposes the Bureau granted a 10% reduction in the original appraised purchase price. The financial capability of the applicant to pay for the land is not a criteria for consideration in determining the fair market value.

The Department has held that land will not be reappraised where the appellant fails to present substantial evidence that the current appraisal is in error. See Daniel Hicken, A-27877 (March 5, 1959). Since appellant has submitted no evidence, and merely relies on its unsupported contentions, there is nothing in the record on appeal to warrant changing the appraisal of the fair market value of this land.

Accordingly, the decision appealed from is affirmed.

The Board of Directors of the Victor Valley Memorial Park is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Victor Valley Memorial Park (Certified Mail)
Hon. Jerry L. Pettis, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1

appeal to Sec. Dismissed A-31140 4-21-69

misc

Alaska: Headquarters Sites 2233.9-1

One who files a notice of location of a headquarters site which does not show occupation, possession and the construction of improvements on the land acquires no rights in the land. The mere marking and posting of the corners of the tract does not constitute occupation or possession.

Glenn R. Heatherly, Fairbanks 1652 (February 19, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 FEB 28 AM 10 00

In reply refer to:
141
Fairbanks 1652

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 19, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Glenn R. Heatherly : Headquarters Site
:
Decision Affirmed

On July 22, 1968, Glenn R. Heatherly filed a notice of location of a headquarters site under the act of March 2, 1927, as amended (48 Stat. 461) for land in unsurveyed sec. 15, T. 1 N., R. 23 E., Copper River Meridian, Alaska, along the north shore of Ptarmigan Lake. In his location notice he claimed settlement on April 22, 1968. By letter-decision of November 7, 1968, Mr. Heatherly was notified that his location notice was declared unacceptable for recordation because he did not show any occupation, possession and construction of improvements on the claimed tract and that in the absence of such action the land became subject, as unappropriated land, to the segregative effect of the Copper River Proposed Classification Order of May 16, 1968 (Fairbanks 955).

On November 19, 1968, Mr. Heatherly filed an appeal stating as his reasons for the appeal that he had staked the four corners of the tract and posted the land on April 22, 1968, and that "I was back again about ten weeks later and while there I attached surveyers (sic) flagging to all four stakes." (emphasis added). He was again notified by letter of November 22, 1968, that his notice was unacceptable for recordation for the reasons given in the earlier letter-decision. In Mr. Heatherly's letter of January 14, 1969, he filed a supplemental statement of reasons, reiterating his previous reasons and further stating that the flagging he had done may have been eight weeks later, rather than ten weeks as previously stated.

In Bureau decision, Beverly Lou Taylor, Anchorage 064044 (February 28, 1966), it was held that one who files a notice of location which does not show occupation, possession and the construction of improvements on the land, does not acquire any rights in the land. Loren John Whittington, Chester H. Cone, A-28823 (August 18, 1961). The Department has also held that the mere filing of a notice of location does not create any rights in the applicant. The statutory provision for the filing of notice is intended to provide information needed for the administration of the public lands. Occupation, possession and the placing of improvements upon the land is a prerequisite to the assertion of a valid right. Kenneth L. Muller, William H. Bayless, AA-533 and 537 (August 31, 1967), and cases cited therein. In Wilbur J. Erskine, 51 L.D. 194 (1925), the Department held that an intention to use the land in the future gave the party no interest in the land.

Since the record shows, and the appellant admits that no action was taken with respect to the land other than the marking of the corners, no act of

occupation, possession or construction of improvements was made. The appellant therefore acquired no rights in the land at the time the proposed classification order became effective and the claimed land became subject to the order as unappropriated land.

The decision of the Fairbanks office was correct and is affirmed.

Glenn R. Heatherly is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Glenn R. Heatherly (Certified Mail)
300 (6)
200
Appeals List No. 1

Permits: Objectives 2236.0-2 misc

A special land-use permit application for 5,000 acres of land in Alaska is properly rejected where all the unreserved lands in the state are withdrawn by PLO 4582 from all forms of appropriation and disposition under the Public Land Laws (except locations for metalliferous metals) and appellant has not demonstrated that his application justifies a modification of the order.

James R. Wright, F-11734 (May 2, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 MAY 16 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

In reply refer to:
141
Fairbanks 11734
May 2, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

James R. Wright	:	Special Land Use Permit
	:	
	:	

Decision Affirmed

Mr. James R. Wright has appealed from a decision of the Manager, Fairbanks District and Land Office, dated February 20, 1969, which rejected his special land-use permit application for approximately 5,000 acres of land near Teller, Alaska, to be used for the development and operation of a centralized freight and petroleum distribution center. The decision held that there are existing land laws under which public lands may be acquired for such commercial purposes; that in view of the mandatory language of the regulation (43 CFR 2236.0-2 (a)) this permit application must be rejected where existing public land laws may be invoked. The Manager's decision also stated that any application submitted must be rejected because the unreserved lands in Alaska are withdrawn from all forms of appropriation and disposition under the Public Land Laws by PLO 4582.

Mr. Wright asserts in his appeal that the approval of his permit application would be justified by Paragraph 5 of Public Land Order 4592. He states that his primary objective in seeking this permit is to establish a centralized freight and petroleum facility that would reduce the cost of transportation to western Alaska. He asserts that this facility will improve the economy of western Alaska by making consumer items available to natives of the area at a much lower cost.

Public Land Order 4582, dated January 27, 1969, (34 F.R. p. 1075) withdrew all the unreserved lands in Alaska from all forms of appropriation or disposition under the Public Land Laws (except locations for metalliferous minerals). Paragraph 2 of that order specifically provides:

> Unless otherwise required by law, all applications for leases, licenses, permits or land title transfers which were pending before the Department of the Interior on the effective date of this order, will be given the same status and consideration beginning at 12 (noon) A.S.T. on April 2, 1971, as though there had been no intervening period, unless previously recalled by the applicant.

It is clear from this language that the granting of a permit application filed after the effective date of the order would be inconsistent with the purposes of the withdrawal. An application filed after January 27, 1969, would not merit any more consideration than applications pending before the Department as of that date.

Appellant cites paragraph 5 of the order asserting that this paragraph allows a modification of the order to accomodate his proposed development. Paragraph 5 does provide for modification or amendments of the order where an application "demonstrates that such modification or amendment is required for the construction of public or economic facilities in the public interest. Applications for such modification or amendment should be filed in the land office of the Bureau of Land Management, Anchorage, Alaska."

A brief review of the file indicates that appellant has not filed the necessary application for amendment or modification of the order. Further, his special land-use application and his appeal documents are completely devoid of any details concerning the proposed development. Appellant has not made a *prima facie* showing of compliance with the requirements of paragraph 5 in order that modification of the order can be considered by the Department.

Accordingly, the decision of the Manager is affirmed.

James R. Wright has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. James R. Wright (Certified Mail)
300 (6)
200
Appeals List No. 1

IN REPLY REFER TO:

March 3, 1849

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of the Hearing Examiners
Room W-2426, 2800 Cottage Way
Sacramento, California 95825

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 JUN 19 AM 10 00

June 18, 1969

DECISION

United States of America, Contestant	:	Sacramento 056150
	:	Railroad Land Grant Patent Application
v.	:	
Southern Pacific Company and Willis E. Dudley, Contestees	:	

Land Declared Nonmineral

This proceeding resulted from a patent application for Lot 6, sec. 3, T. 17 N., R. 9 E., M.D.M., containing 38.20 acres, filed for the benefit of Willis E. Dudley under Section 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65(b) (1964). The act authorizes the issuance of patents for land sold by common carriers to innocent purchasers for value. Lot 6 was sold on April 19, 1895, by the Central Pacific Railroad Company, predecessor of the Southern Pacific Company, to John Bonney, predecessor of Willis E. Dudley. The Manager of the Land Office of the Bureau of Land Management at Sacramento, California, rejected the application on the ground that the land was mineral in character on July 1, 1962, the date of the railroad grant, and that because of the character of the land in 1862 the 1940 act did not apply. This decision was affirmed by the Director.

On appeal the Secretary of the Interior, for reasons fully set out in Southern Pacific Company, A-29736 et al. (May 27, 1964), held that the mineral character of the land on the date of sale by the railroad rather than the date of grant to the railroad was the controlling date to be used in determining the applicability of the 1940 act. He thereupon set aside the decision below and remanded the proceeding for a hearing and a decision on the issue of whether Lot 6 was known to be mineral in character as of April 19, 1895. In his decision the Secretary cited with approval the case of United States v. Southern Pacific Co., 251 U.S. 1, 14 (1919) in which the criteria for determining whether land is mineral in character is set forth as follows:

> It is not essential that there be an actual discovery of mineral on the land. It is sufficient to show only that known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act.

Also he cited Central Pacific Railway Company, 46 L.D. 435 (1918), and United States v. Central Pacific Railway Company, 49 L.D. 250 (1922), for the ruling that at a hearing the Department has the obligation of presenting a prima facie case that the land was mineral in character on the critical date whereupon the burden shifts to the railroad to show by a preponderance of the evidence that the land, or any part thereof, was not mineral in character.

The hearing was held in Sacramento, California, on October 1, 1968. At the hearing the contestant was represented by Mr. E. Kendall Clarke, Attorney at Law, Office of the Regional Solicitor, Sacramento, California. The contestees were represented by Mr. Willis E. Dudley of Wells & Baldwin, Attorneys at Law, Sacramento, California.

Lot 6 is on the west side of the Sierra Nevada range within the drainage of the South Yuba River. This river joins with the Feather River at Marysville, and the combined river flows into the Sacramento River north of the City of Sacramento. It was within the drainage of the Sacramento River that the early 49'ers found rich placer deposits in the beds of the present streams. Not long afterwards the miners discovered that the source of much of the gold was from tertiary gravels in ancient channels which had been exposed by erosion and the present rivers. These tertiary gravels were found in large deposits and had a gold content of a few cents to 25 cents a cubic yard. Because of the relatively low grade, they could not be worked by the usual placer methods.

In 1853 rudimentary hydraulic nozzles were developed and hydraulic operations were begun. In this method a stream of water under pressure is discharged against banks of gravel and clay. The loose material is then washed through long sluice boxes for the gold content and the debris is dumped indiscriminately into the nearest river. Within a few years the method was substantially improved and larger streams of water under great pressure were secured by the use of "monitors" or "giants" with nozzles up to 9 inches in diameter. By 1870 there were huge hydraulic operations disgorging enormous quantities of mining debris into the river canyons in the mountains. The early spring floods cascaded this debris downstream

into all of the tributaries of the Sacramento and eventually into the Sacramento River itself. As a result the channels were filled and the flood waters along with the debris were spilled out on the flat lands of the valley. Farms were ruined, cities were inundated, and navigation on the Sacramento River was endangered. This resulted in a struggle between the farmers in the valley and the hydraulic miners in the mountains that lasted for decades. In 1880 at the height of the activity the U. S. Army Corps of Engineers reported 46 million cubic yards of gravel was mined and 710,000 acre feet of water was used. To secure the water for the operations dams and long ditches were constructed at an estimated cost of one hundred million dollars.

The ever increasing amount of debris accelerated the damage downstream as well as the opposition to hydraulic mining. After a long series of legal disputes the controversy was resolved in favor of the valley residents by Judge Lorenzo Sawyer in Edward Woodruff v. North Bloomfield, 18 Fed. 753 (1883) (Cir. Ct. D. Cal. January 7, 1884), commonly referred to as the Sawyer decision.

Woodruff brought the action to restrain several mining companies engaged in hydraulic mining on the western slopes of the Sierra Nevada Mountains from discharging their mining debris into the affluents of the Yuba River and into the river itself where it was carried down by the current into the Feather and Sacramento Rivers. The decision is extensive and gives much of the background for the conflict between the miners and the farmers. The court eventually enjoined the hydraulic miners and held in part that unless dumping tailings into navigable rivers was authorized by law it constituted a general and far reaching public and private nuisance.

This decision was followed by People v. Gold Run Ditch & Mining Co., 4 Pac. 1152 (November 25, 1884). Here the Supreme Court of California held that (syllabus):

> The owner of hydraulic mines, situate on the banks of an unnavigable stream which empties its waters into a navigable river within the state, has no right to dump its hydraulic debris into the stream, to the endangerment of habitation and cultivation of large tracts of country, upon which are cities, towns, and villages, and to the impairment of the navigation of such river. Acts of this nature constitute a public nuisance, which may be enjoined in an action in the name of the people of the state, although other mining companies, acting separately and independently of each other, contributed in producing such nuisance.

These decisions effectively terminated legal hydraulic operations in California. Later the Caminetti Act of March 1, 1893, 33 U.S.C. 661 et seq., established the California Debris Commission, a Federal agency

under the supervision of the Corps of Engineers, and authorized the Commission to issue permits for hydraulic mining to individuals or corporations with the capacity to store their mining debris. There were a number of permits issued but by 1893 the canal system in the mountains had either been destroyed or sold to irrigation districts or power companies and the water rights for hydraulic mining were lost for non-use. In 1930 the Corps of Engineers constructed two large retention dams, the Englebright Dam on the Yuba River, and the North Fork Dam on the North Fork of the American River, at a cost of $4,650,000. As late as 1967 only a small volume of material was mined as the result of the construction of these dams. By the time the dams were completed the relative value of gold had fallen making hydraulic mining in the area practically impossible. In 1967 the Bureau of Mines initiated an investigation to determine if there was any other feasible method of mining the tertiary gravels of California. 1/

The Government's case was presented through the testimony of Mr. George O. Scarfe, Jr., a mining engineer employed by the Bureau of Land Management, and various documentary exhibits. Mr. Scarfe examined Lot 6 and, at the time, he had a map from "Economic Geology Sheet," U.S.G.S. Folio 66, dated 1910. The map was prepared by Mr. Waldemar Lindgren 2/ from field notes made during the period from 1887-1895 (Exh. 3). The map delineates the extent of the auriferous gravels extending from the North Bloomfield Company's Malakoff Diggings westward for approximately four miles, and encroaching on and across the west one-half of Lot 6. Mr. Scarfe verified the existence of the tertiary gravels on the west one-half of the lot. The east one-half has a capping of andesite tuff breccia. He took samples of the gravel and recovered values comparable to the values found on the surface at the Malakoff Diggings two miles east of Lot 6. Also he found two adits and a minor amount of very old placer diggings on the lot. He found no indication that the lot had been hydraulically mined.

The exhibits include published documents regarding the tertiary gravels in the area. Exhibit 3 is the U.S.G.S. Folio 66, dated 1910, previously mentioned. The following comments on the North Bloomfield Company operation appear at page 8:

1/ Much of this background information is from a 1968 Bulletin issued by the Bureau of Mines entitled "Gold Resources in the Tertiary Gravels of California" (Exh. 7) and the Sawyer decision. An interesting and detailed account of the struggle between the farmers and the miners can be found in "Gold v. Grain" by Robert L. Kelley, Library of Congress Catalog Number 59-14059.

2/ Mr. Lindgren was a mining engineer and has been recognized by the Department as an authority in the field.

> Hydraulic mining has been carried on at North Bloomfield /Malakoff Diggings/ on a very large scale. The excavations extend for 5000 feet, and are 500 to 600 feet in width. The banks are as much as 500 feet in height. The deposit has been opened by a bedrock tunnel 7874 feet long, starting from Humbug Canyon. The sum of $3,000,000 is said to have been expended upon this tunnel, the water supply, and other preliminary work. Shortly after the completion of the tunnel hydraulic mining was suspended by injunction of the courts, and since then the only gravels worked have been those the tailings of which could be impounded before reaching the river.

Exhibit 4 is the field notes of deputy surveyor Henry S. Bradley completed on May 5, 1872. The notes have an attached plat with the designation "Mineral Land" across the north one-half of Township 17 North, Range 9 East, M.D.M., which includes Lot 6. Exhibit 5 is a letter of transmittal of "California State Mining Bureau Bulletin No. 92" dated June 1923, from the State Mineralogist to the Governor. This letter provides in part:

> As a result of adverse legislation, placer mining (particularly hydraulic) was practically brought to a standstill by the Sawyer decision in 1884. The fact that vast sums remain in the gravels of our ancient river channels is shown by the result of two years of investigation, and that there is, roughly, in the neighborhood of $1,000,000,000 that can be recovered economically.
>
> A perfectly feasible plan for the working of the ground under the provisions of the Caminetti Act is suggested, and is to some extent now being carried out by private corporations.
>
> This bulletin is presented to the public in the hope that the information contained will result in a benefit to the State of California, as well as to the gold mining industry.

Exhibit 11 is a copy of a location notice for the Wolverine Gravel mining claims which include the Heal Location, dated March 20, 1876, signed by twelve people including John Bonny. In other documents his name is spelled Bonney and his signature appears in the form of a mark. Attached to the exhibit is a mineral application plat dated January 11, 1877, showing the Heal Location adjoining the west line of Lot 6 and showing the Mt. George Location within Lot 6. This latter location has never been declared invalid.

Exhibit 12 is an application for patent by John Bonney signed with a mark for the Bonney Placer claim located one-quarter of a mile to the north of Lot 6. This exhibit includes an affidavit of citizenship showing that John Bonney was born in Cornwall, England, in 1824. Mr. Scarfe suggested "He is a Cornishman, undoubtedly a miner" (Tr. 47).

The deed from the Central Pacific Railroad Company to John Bonney dated April 19, 1895 (in the contest file), conveys Lots 2 and 6, sec. 3, T. 17 N., R. 9 E., M.D.M., for a consideration of $250. A house was later built on Lot 2 and was known as the Bonney House.

In addition to the Mt. George Claim Mr. Scarfe testified that the following claims were located in all or a part of Lot 6:

Deadwood Claim - located July 8, 1910
Columbia Hill Consolidated Outlet - located January 4, 1913
The Sunset - located July 2, 1921
Gray Claim - located July 2, 1921
Lamplight Claim - located November 1, 1949
Marguerite Claim - located November 9, 1956

Mr. Scarfe concluded the substance of his testimony with the opinion that Lot 6 was mineral in character as of April 19, 1895. When asked for the basis of the opinion he responded (Tr. 49):

> "On the -- the gravels showing on Lot 6, which if they are there today, they were there in 1895. And the geology of the adjoining land, and the history of mining in the adjoining lands.
>
> "And the value of the gravels, where I sampled them on the lands, were of a value that were being mined by the hydraulic mining method in the area at the time of the original purchase, were considered mineral in character at the time. Being in April 1895."

In the usual Government contest involving mineral lands the Government challenges the validity of a mining claim on the grounds that the land is nonmineral in character, and that a discovery of a valuable mineral deposit has not been demonstrated. In such a contest the Government can present a prima facie case through the testimony of a mining engineer that he has examined the claim and that there is no mineral exposed. This is negative evidence but it is sufficient to place on the adverse party the burden of affirmatively establishing that there is valuable mineral, that there is a means of recovery, and that the potential profit is sufficient to justify expenditures with a reasonable prospect of success.

The present case presents the reverse situation. Here the Government must submit sufficient evidence to support an affirmative ruling that there was

a valuable mineral deposit on Lot 6 as of April 19, 1895, for a prima facie case. Its evidence standing alone is sufficient for a finding that there is tertiary gravel containing gold on the west one-half of the lot, and that similar material was successfully mined by the hydraulic method for a decade or more prior to the Sawyer decision in 1884. However, there was no evidence that the tertiary gravel on the lot or in the area could be successfully mined after that date. A minor volume of tailings at the Malakoff Diggings were processed after this date but the North Bloomfield Mining Company ceased operations a short time later. In the absence of a method of extracting the gold from the gravel there is no showing that known conditions were such as to reasonably engender the belief that the land contained mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end in 1895, or that the land was mineral in character at that time.

Accordingly, I find that Lot 6, sec. 3, T. 17 N., R. 9 E., M.D.M., was nonmineral in character as of April 19, 1895, and that John Bonney was an innocent purchaser for value at the time he purchased the lot from the Central Pacific Railroad Company. Because of this ruling the evidence on behalf of the contestees has not been outlined.

This decision becomes final thirty (30) days from its receipt unless an appeal to the Director, Bureau of Land Management is filed. There must be strict compliance with the regulations in 43 CFR 1840 (see enclosed Circular 2137). If an appeal is taken, it must be filed in the Office of the Hearing Examiners, Room W-2426, 2800 Cottage Way, Sacramento, California 95825. The addresses of the adverse parties to be served with a copy of the appeal appear below.

Graydon E. Holt

Graydon E. Holt
Hearing Examiner

Enclosure

Distribution:
Regional Solicitor, U. S. Dept. of the Interior, Room E-2753, 2800 Cottage Way, Sacramento, Calif. 95825 (Cert.)
Philip C. Wilkins, Attorney, 717-20th Street, Sacramento, Calif. 95814 (Cert.)
John J. Wells, Attorney, 314 Crocker-Citizens Bank Bldg., 1007 Seventh Street, Sacramento, Calif. 95814 (Cert.)
W. E. Dudley, 1016 Vallejo Way, Sacramento, Calif. 95818 (Cert.)
Manager, Land Dept., Southern Pacific Co., 65 Market Street, San Francisco, Calif. 94105 (Cert.)

Standard Distribution

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1969 JUN 19 AM 10 00

airport lease

Special Use Leases: Airports 2235

Where the objections to issuance of an airport lease are met by the appellant, the decision rejecting the airport lease application will be reversed, and the case remanded for the issuance of the lease.

Eagle Mountain Fliers, Inc., Riverside 1168 (July 8, 1969)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 JUL 24 AM 10 00

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 JUL 24 AM 10 00

In reply refer to:
141
Riverside 1168

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

July 8, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Eagle Mountain Fliers, Inc. : Airport Lease Application
:

Decision Reversed - Case Remanded

On December 14, 1967, the Eagle Mountain Fliers, Inc., filed application for an airport lease on land described by metes and bounds within sec. 1, T. 4 S., R. 14 E., and secs. 6 and 7, T. 4 S., R. 15 E., S.B.M., California, pursuant to the act of May 24, 1928, 45 Stat. 728, as amended; 49 U.S.C. 211-214 (1964). The land involved has been used as an airstrip by this applicant since 1964, for which it has paid trespass charges each year at the rate assessed by the local office. The airstrip is laid out in approximately a northwest-southeast direction on public land not otherwise appropriated.

By decision of March 5, 1969, the Riverside District and Land Office rejected the airport lease application for the following reasons:

1. Mine tailings near the northeast side of the airstrip are over 100 feet high and constantly being built higher; aircraft might have trouble clearing these tailings, causing the craft to turn northwest where the town of Eagle Mountain is located, with its schools and water tower 4,000 and 7,000 feet distant, respectively.

2. The landing strip cannot be lengthened enough to meet specifications of the California Aeronautics Division. The height of the tailings in relation to the glide angle prohibit further extension in that direction. No lengthening to the southeast can be accomplished because of the location of the Colorado River Aqueduct of the Metropolitan Water District, since the District will not allow encroachment upon its lands. No cross runways can be added because the airstrip is located between the Kaiser Steel Corporation's tramroad and the County road.

3. Riverside County owns an airstrip at Desert Center, ten air miles from the land at issue, and about 15 miles by highway from Eagle Mountain Community. The land applied for would serve only a few individuals who could adequately be served by the County airstrip at Desert Center.

4. The 1928 act contemplates "public" airports and no showing has been made that there is a sufficient "air public" to create a need for this facility, other than the use by this private club.

5. The airstrip has been only conditionally approved by the California Aeronautics Division, and does not meet the minimum safety standards. Lengthening of the strip is required, as noted in 2., above.

6. The Los Angeles office of the Federal Aviation Agency advised the applicant on September 15, 1967, that it would not be appropriate to conduct an airspace evaluation of the area concerned.

On October 18, 1967, the Riverside office notified the applicant that it had been determined that the lands "cannot be classified as suitable for airport use," instructing the Eagle Mountain Fliers to remove all aircraft and facilities within 30 days from the receipt of the notice, failing in which the Riverside office would mark the strip as hazardous, pursuant to FAA regulations. (The strip was so marked, but the Fliers have continued to use it.) The Fliers filed a notice of appeal and statement of reasons in response to the October 18, 1967, notice. The Riverside office, in its response thereto, stated that the purported appeal would be considered as a protest to the notice of unauthorized use of the land. Subsequently, the applicant filed its formal lease application, from the rejection of which this appeal was taken.

The appellant argues that the "conditional approval" by the California Aeronautics Division is based on the fact that the appellant does not have tenure on the land upon which the airstrip is built, which is the basis for its lease application; that the FAA refusal to conduct an airspace evaluation was predicated on the prior indication by the Riverside office of its opposition to the airstrip. Informal discussion with the Washington office of the FAA indicates that an airspace evaluation would be made promptly upon a showing that a lease would be issued to the applicant.

The report of a field examination states that the aircraft using the strip take off northwesterly because of prevailing winds in the area. This is contradicted by the appellant's statement that all approaches and take-offs from the airstrip are from the east, or directly in the opposite direction from the Eagle Mountain community.

The tailings piles referred to are tailings ponds into which the Kaiser Corporation is pouring the slurry from its mining operations. The closest pond to the airstrip has already been built to its maximum height and another pond further north is already being used. An on-the-ground examination and measurement by the field representative of the California Aeronautics Division was made prior to that Division's conditional approval of the airstrip. It was affirmatively determined that the Division's requirements of a 20:1 glide angle with 3,800 feet of usable runway would be adequately met by the applicant, and there was, therefore, no hazard from the tailings pond.

The appellant points out that the airstrip is planned to be extended southeasterly to a length of 4,500 feet, and that the Kaiser Corporation is prepared to assist in lengthening the strip and grading the surface.

The record indicates that this can be done without encroaching on any of the privately-owned or controlled lands, including that of the Metropolitan Water District, and that sufficient lift-off space would be available farther from the tailing ponds, even assuming that the aircraft would take off in the direction of the ponds and the nearby Eagle Mountain community.

Additionally, the appellant shows that the Kaiser Corporation and the Bank of America, among others, maintain daily movements to and from this airstrip in servicing their operations in the area, and need the airstrip for those purposes. Kaiser Corporation is also currently negotiating with an air ambulance service to include Eagle Mountain in its network. This requires a lighted runway to provide 24-hour service, which the Bank of America has offered to provide in accordance with State and Federal specifications. Oil companies have also offered their services to supply proper fueling facilities. All these factors give positive indication that the airstrip can be readily made operable within the requirements of all Federal and State agencies concerned with airport operations and safety, and that there is an adequate air public which needs the use of this airstrip on a regular basis.

While the Riverside office questioned the need for two airstrips in the general area, and comments about the Desert Center airstrip, the Riverside County officials have stated clearly that the Desert Center strip has no facilities for servicing or tying down planes, and they feel that it is important to keep the Eagle Mountain strip operating.

In these circumstances, there appears to be no basis for the rejection of the lease application, and the decision of March 5, 1969, is reversed.

The case record is remanded to the Riverside office, through the State Director, for appropriate action to issue an airport lease to Eagle Mountain Fliers, Inc. It should be noted that the airport lease form requires the lessee to keep the airport equipped and maintained in accordance with the requirements of the Federal Aviation Agency, and that construction of such facilities must be completed within six months from the execution of the lease. This should be ample assurance that all safety and equipment standards must be met, failing in which the lease may be terminated.

Newton Frishberg

Chief, Office of Appeals
and Hearings

DISTRIBUTION:

James E. Good, Attorney at Law (Certified Mail)
300 (6)
200
Appeals List No. 1

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1969 JUL 24 AM 10 00

appeal to Sec
A-31209

Alaska: Timber Sales and Disposals: 5400

Sales of timber in Alaska are governed not only by the specific regulations in 43 CFR Subpart 5409, but also by all applicable portions of the forest product disposals regulations in 43 CFR Part 5400.

Alaska: Timber Sales and Disposals: 5400

When the public interest will best be served by competitive bidding at an advertised sale, it is not an abuse of discretion for the authorized officer to deny an application for a negotiated sale of timber.

Andrew W. Miscovich, Fairbanks 8412 (August 26, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 SEP 10 AM 10 00

In reply refer to:
141
Fairbanks 8412
August 26, 1969
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

DECISION

Andrew W. Miscovich : Timber Sale Application
:

Decision Affirmed

On October 18, 1968, Andrew W. Miscovich filed application to purchase 250M board feet of timber in the area adjacent to the protest area of the native villages of Allakaket, Hughes and Huslia, Alaska. By decision of April 29, 1969, the Fairbanks District and Land Office rejected the application because the regulation, 43 CFR 5411.1, requires that all sales, other that those specified in sub-part 5421.1, shall be made only after inviting competitive bids through publication and posting; and that as long as demand remains, the public interest requires that any timber sold in the area must be advertised. The decision further states that it is not in the public interest to have a negotiated sale of the timber because of the many applications and the demand for timber from this area along the winter road (recently constructed).

Mr. Miscovich has timely filed his appeal, contending that the denial of his application is based on the portions of the regulations which are not applicable. He states that Alaska timber sales are completely covered by the regulations in 43 CFR 5409, which was originally introduced to facilitate the sale of Federal timber in Alaska, that since there is a separate section of the regulations for Alaska, it must be inferred that such sales are subject only to 43 CFR 5409 and no other sections of the regulations; and that when the reasons for the rejection of his application are based on inapplicable sections of the regulations, this is an abuse of the discretion of the authorized officer.

While there is a separate section of the regulations specifically applicable to Alaska, timber sales in Alaska are also governed by the general timber sale laws and regulations. 43 CFR Subpart 5409 is based on section 11 of the Act of May 14, 1898, as amended, 48 U.S.C. 421, which states in pertinent part:

> "The Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber * * * upon public lands in Alaska, and may * * * sell so much thereof * * * as he shall prescribe * * *." (emphasis added).

Authority for the disposal of timber or other forest products on public lands in Alaska was further authorized and supplemented by the terms of the Act of July 31, 1947, as amended, 30 U.S.C. 601, et seq.

In view of the broad language of these laws which granted discretion to the Secretary or his delegate to dispose of the timber, the narrow limitation placed on the timber sale regulations by the appellant is without merit, and there was no abuse of discretion by the local Bureau officials in denying the appellant's application for a negotiated timber sale. The decision of the Fairbanks office is therefore affirmed.

Mr. Miscovich has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

DISTRIBUTION
Rice and Hoppner, Attorneys (certified mail)
300
200
Appeals List No. 1

Railroad Grant Lands 2224 misc

Patent may be issued, pursuant to section 321(b) of the Transportation Act of 1940, for railroad grant lands sold by the railroad in 1895, where it has been determined that the land was not mineral in character at the time of the sale and the buyer was an innocent purchaser for value.

Where the Government fails to establish the mineral character of railroad grant lands at a hearing by showing that the known conditions on the critical date, April 19, 1895, were such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end, the decision of the Hearing Examiner in favor of the applicants for patent will be affirmed.

United States of America v. Southern Pacific Company, Sacramento 056150
(November 6, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 NOV 28 AM 10 00

In reply refer to:
141
Sacramento 056150

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

November 6, 1969

DECISION

United States of America	:	Railroad Grant Lands
	:	
v.	:	
	:	
Southern Pacific Co.	:	
	:	

Decision Affirmed

The Bureau's California State Director, by and through the Office of the Regional Solicitor, U. S. Department of the Interior, has appealed from a decision of the Hearing Examiner, dated June 18, 1969. That decision held that the Southern Pacific Company, as successor in interest to the Central Pacific Railroad Company of California, and acting on behalf of the successors in interest of the railroad company's vendee, Willis E. Dudley, who is the real party in interest, is entitled to a patent to Lot 6, Sec. 3, T. 17 N., R. 9 E., M.D.M. for the reasons that the subject lot was nonmineral in character as of April 19, 1895, when John Bonney was an innocent purchaser for value from the Central Pacific Railroad Company. The legal basis for this determination is the Railroad Land Grant Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356 and of section 321(b) of the Transporation Act of 1940, 54 Stat. 954, 49 U.S.C. 65(b) 1964. A hearing in this matter was ordered by departmental decision Southern Pacific Company, 71 I.D. 224 (1964).

When the Southern Pacific Company's application for a patent was originally filed, it was rejected on the ground that the land was mineral in character on July 1, 1962, the date of the railroad grant and because of the character of that land in 1862, the 1940 Act did not apply. This decision was affirmed by the Director. The departmental decision, supra, set the Director's decision aside and remanded the case, holding that the mineral character of the land on the date of the sale by the railroad, rather than the date of the grant to the railroad, was the controlling date to be used in determining the applicability of the 1940 act, supra. The Departmental decision also held that the Government has the obligation of presenting a prima facie case that the land was mineral in character on the date of the sale in 1895. The Hearing Examiner's decision sets out in considerable detail the mineral history of the land in the area of Lot 6. This decision describes how the early 49'ers found large deposits of tertiary gravels in the rivers in the area but the gold content of a few cents to 25 cents was of such a low grade that it could not be worked by the usual placer methods. In 1853 hydraulic methods were developed to loosen the materials and by 1870

huge hydraulic operations were in effect. This, however, resulted in clogging up the river channel and, as a result, farms were ruined, cities were inundated and navigation was threatened. In 1883, the court in Edward Woodruff v. North Bloomfield, 18 Fed. 753 (1883) (Cir. Ct. D. Cal. January 7, 1884), ruled in favor of the valley residents by enjoining the hydraulic miners from dumping tailings into navigable rivers. This and an 1884 California Supreme Court decision 1/ effectively terminated legal hydraulic mining operations in California. By 1893 the canal system in the mountains had either been destroyed or sold to irrigation districts or power companies and the water rights for hydraulic mining were lost for nonuse.

The Bureau's mineral examiner concluded that Lot 6 was mineral in character as of April 19, 1895, because of the gravels on Lot 6, the geology of the adjoining lands, and the history of mining on adjoining lands. The sampled gravels were of a value being mined by hydraulic methods in the area at the time of the original purchase and were considered mineral in character at the time. There was no indication, however, that this lot had ever been hydraulically mined. The Hearing Examiner ruled that in the absence of a method of extracting the gold from the gravel there is no showing that the known conditions were such as to reasonably engender the belief that the land contained mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end in 1895, or that the land was mineral in character at that time.

The appellant alleges that the Hearing Examiner's decision is in error for the following reasons:

1. The conclusions of the Bureau's mining engineer that Lot 6 was mineral in character in 1895.

2. The mining by the Bloomfield Company in the area from 1870 to 1876 where it recovered gold values ranging from 2.9 to 12.7 cents per cubic yard.

3. John Bonney, the original purchaser, was interested in other mining claims in the area and he obtained a mineral patent in 1883 for land located near Lot 6.

4. Other individuals filed an application for a mineral patent for Lot 6 in 1877 and this application remained on file until 1908.

1/ People v. Gold Run Ditch and Mining Company, 4 Pac. 1142 (November 25, 1884).

5. A mineral location was made for Lot 6 and adjoining lands by others.

The Bureau's mineral examiner testified at the hearing that hope of mining was given up in the area between 1883 and 1893 because of the Federal Court decision in 1883, supra (TR. 100). He also testified that his gold samples from the lot were worth 4 cents per yard at the price of gold prevailing in 1895 or the equivalent of 6 cents per yard at the current price, and that 6 cent material cannot be successfully mined today (Tr. 95). There was no evidence that Bonney located on or conducted mining operations on Lot 6 (Tr. 74). Also, there was no evidence that in 1895 Bonney was buying up a large acreage so that it could be profitably mined (Tr. 78). On the other hand, there was evidence that on September 9, 1897, Bonney conveyed Lot 6 to his wife describing it as the "Bonney farm or ranch." (Tr. 90).

This is the second case that has been appealed to the Director since five such cases were remanded by the Department in 1964. The first case involved Sacramento 061438 where the Southern Pacific Co. appealed for the benefit of Frank V. and Gertrude L. Amaral. In that decision which was issued on July 17, 1968, this Bureau held, citing Austin v. Mann, 56 I.D. 85 (1937), that the proximity of valuable mines is not sufficient to establish the mineral character of lands. Also, the fact that the lands are in mineral country is insufficient, citing United States v. Plowman, 216 U.S. 372 (1910). Mention was also made of the frequent departmental decisions that had declined to hold lands mineral in character where the evidence of mineralization is so slight as not to afford encouragement for mineral exploration and development.

The mineral values in question were too low for economic mining except by large-scale hydraulic methods. Therefore, when the hydraulic mining stopped in 1883, then for all practical purposes all mining was stopped because there was no other way of economically removing the low gold values. And so to this day, although methods are being considered for removing the gold ore, the Bureau's engineer admits that available methods, other than hydraulic removal, would not be economical.

Furthermore, no evidence has been submitted showing that the original purchaser believed or had any reason for believing from any known conditions that the land was of known mineral character on the date of the sale in 1895, or that he thereafter conducted himself on the land so as to establish any basis for believing that the land was mineral in character.

In view of the foregoing, the mere fact that another person had filed an application for a mineral patent for the land in 1877 and this application remained on the Bureau's records until 1908, is not decisive in this case.

The test set out in State of California v. Radeffer, A-30611 (June 28, 1968), that the known conditions must be such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end, have

not been met by the appellant. Therefore, it was properly held that Bonney was an innocent purchaser for value. See Chapman v. Santa Fe Pac. R. Co., 198 F. 2d 498 (4th Cir. 1952).

Accordingly, the Hearing Examiner's decision is affirmed.

Chief, Branch of Land Appeals
Office of Appeals and Hearings

DISTRIBUTION:
Regional Solicitor, U.S. Dept. of the Interior, Sacramento, Calif.
Wells & Baldwin, Attorneys at Law
Willis E. Dudley
Southern Pacific Company
Hearing Examiner, Sacramento, California
Hon. Harold T. Johnson, House of Representatives
300 (6)
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Appeals List No. 1

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mse

Scrip: Forest Lieu Selections 2221.8

The act of July 6, 1960, 74 Stat. 334, 335, repealed the 1922 Act which authorized the issuance of quitclaim deeds for lands conveyed to the United States for forest lieu selection purposes in cases where the exchange was never consummated. The 1960 Act also forbade the issuance of quitclaim deeds by the Government for such lands under Section 6 of the Act of April 28, 1930, 46 Stat. 257, 43 U.S.C. 872. Since there is now no authority therefor, the rejection of an application for the issuance of such a quitclaim deed must be affirmed.

Masonic Homes of California, Sacramento 2670 (April 24, 1970)

OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1970 MAY 18 AM 10 00

In Reply Refer to:
141 Sacramento 2670

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

April 24, 1970

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Masonic Homes of California	:	Forest Lieu Selection

Decision Affirmed

On May 29, 1969, Masonic Homes of California, claiming as successor in interest of Hiram Hamilton, deceased, filed application for a quitclaim deed to the SW¼SE¼ sec. 36, T. 7 S., R. 22 E., Mount Diablo meridian, California, under Section 6 of the Act of April 28, 1930 (46 Stat. 257; 43 U.S.C. 872).

It appears that title to the land at issue originally passed to the State of California upon approval of the Federal survey on September 7, 1878; and that the State conveyed it to Hamilton by issuing him California Patent No. 10552 therefor on October 12, 1901. The land was encompassed within the exterior boundaries of Sierra National Forest (see Proclamation of February 14, 1893, and Executive Order of July 1, 1908). The Forest Exchange Act of June 4, 1897 (30 Stat. 36) afforded the owners of such private lands situated within national forests an opportunity to convey such lands to the United States and to **select other** public lands of equal area in exchange.

On October 25, 1901, Hamilton recorded his deed conveying the land in question to the United States in the deed records of Madera County, California. Thereafter, Hamilton, by various attorneys in fact, filed three separate selections of public land in 1901, 1928, and 1932, same being Spokane 01826, Carson City 016897 and Carson City 017980 respectively, all of which were unsuccessful. By Departmental decision A-21005, dated December 8, 1937, Hamilton's right of reselection was denied on the ground that he had withdrawn his original selection application, and that thereafter selection rights were precluded by the Act of March 3, 1905 (33 Stat. 1264). However, Hamilton was not served with this decision, it being returned to the General Land Office by the postal service on November 22, 1938, marked "Deceased." Mr. Hamilton at no time formally applied for a reconveyance of the offered land, although it is alleged that the land office misled him to believe that new selection applications would be entertained and failed to advise him of his right to apply for a quitclaim.

The law relating to forest exchanges has been altered considerably over the period with which we are here concerned through the enactment of several statutes.

The 1897 Act, supra, pursuant to which the base land was conveyed to the United States, was repealed (with certain provisos) by the Act of March 3, 1905 (33 Stat. 1264). This resulted in clouded titles to lands conveyed to the Government prior to the 1905 Act for which no selections had been made. To correct this, Congress passed the Act of September 22, 1922 (42 Stat. 1017, 16 U.S.C. 483). This was a relief measure which authorized the Commissioner of the General Land Office to relinquish and quitclaim all title to base lands conveyed in good faith to the United States by private owners who failed to obtain other lands because an exchange could not be agreed upon. Prior to the enactment of this statute there was no authority in the Department of the Interior to execute a quitclaim deed for these base lands. W. J. Carney, 50 I. D. 435 (1924). This authority expired September 22, 1927, under the terms of the Act.

However, many of the claimants failed to make timely application for quitclaims to their base lands under the 1922 Act. Accordingly, Section 6 of the Act of April 28, 1930 (46 Stat. 257, 43 U.S.C. 872) directed the Secretary of the Interior to execute a quitclaim deed to the parties entitled thereto where a conveyance of land had been made to the United States incident to an exchange of lands and where the application for such exchange was thereafter withdrawn or rejected. The Department considered it mandatory under this act to execute a quitclaim deed of the conveyed land to the party entitled thereto, notwithstanding the status of the land as shown on the records of the Department. Rembrandt H. Peale, A. 14858 (September 30, 1930).

The Act of July 6, 1960 (74 Stat. 334) provided for payment, upon application within one year of the date of enactment, at $1.25 per acre, of the claims of all persons who conveyed lands to the United States as a basis for lieu selection in accordance with the Act of June 4, 1897, supra; repealed the Act of September 22, 1922, supra; and expressly prohibited any reconveyance of such lands under section 6 of the Act of April 28, 1930, supra.

Appellant argues that title to the Hamilton land did not vest in the Government because the deed was not accepted by the Government, and that the execution and recordation of the deed and the tender thereof to the United States was a mere assertion by the applicant of his title and the right to make the selection, citing United States v. McClure, 174 F-510 (9th Cir., 1909), and authorities collected therein. The non-acceptance of the deed on the part of the United States, it is averred, is evidenced by the return of the deed to Hamilton in 1909 and 1923 and by the fact that the land was regarded as privately owned for many years thereafter on the records of the Forest Service.

The significance of the return of the deed to the applicant as evidence of its non-acceptance by the Government is indicated in Roughton v. Knight, 219 U.S. 537 (1911), in which case the Court said:

> That a proposal for an exchange of land within a forest reservation for lands outside may be withdrawn before acceptance is an obvious proposition. There having been no contract in force between this appellant and the Secretary of the Interior at the date of repeal, he had no right to save under the exceptions in the repealing act.

On the basis of this, and other authorities cited, appellant maintains that the failure of acceptance of the deed by the United States means the failure of the conveyance and that, accordingly, ownership remained vested in Hamilton. It is further maintained that despite the execution and recordation of the deed conveying the legal title, the equitable title remained with Hamilton, as recognized by the Act of 1922 and the Act of 1930 and by various case authorities, including Hiram M. Hamilton, A. 16762 (August 31, 1932), in which this Department held that:

> It can not be said that equitable title and right to the lands relinquished by Hamilton in 1902 passed to the United States by the spreading of his deeds upon the record. On the contrary, it is clear that all equitable estate and right of property remained in the title proponent * * *.

It seems quite clear to us that until passage of the Act of July 6, 1960, supra, Hamilton or his successors in interest were entitled to receive a quitclaim deed pursuant to section 6 of the 1930 Act. The essential question, therefore, is whether the 1960 Act affected this right. As we have seen, appellant maintains that that act has no application to the lands in question and, accordingly, the authority to execute quitclaim pursuant to the 1930 Act remains unaffected with reference to these lands.

We cannot agree. We have carefully studied the language of the statute as well as the legislative intent as indicated in the Report of Hearing of the House Subcommittee on Public Lands on H. R. 9142. As pointed out in the decision below, section 1 of the act refers to precisely the situation we are faced with here. There can be no shred of doubt that it was the intent of Congress to retain these lands in Federal ownership. The act admits to no other reasonable construction. If the United States had not accepted the conveyances thertofore, acceptance can be fairly inferred from this legislation. Accordingly, the prohibition against reconveyance contained in section 3 of the act revoked the authority to execute quitclaims, and precludes favorable consideration of appellant's application.

Appellant's final argument is directed against the constitutional quality of the Act of July 6, 1960. It is contended that the statute, as applied, works a forfiture, that it deprives Appellant of its constitutional right to just compensation for land taken for public use, and amounts to a taking without due process of law. Moreover, it is said to be violative of every principle of contract and equity. In support of these arguments Appellant quotes extensively from correspondence originating both in the Department of Agriculture and the Department of the Interior wherein various officials of those agencies expressed doubts concerning the validity of the statute.

This is an issue not within the jurisdiction of an administrative agency, which is bound by the laws as enacted. The jurisdiction of this office is limited to a consideration of whether the pertinent statutes, regulations and interpretive authorities have been correctly invoked and applied by the subordinate offices of the Bureau of Land Management in the administration of their proper functions.

We have concluded that the Act of July 6, 1960, was correctly construed in accordance with its terms by the Sacramento Land Office in this instance and, accordingly, the decision of that office is affirmed.

Masonic Homes of California has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

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